

THE CONSTITUTION OF THE NORTHWEST TERRITORIES

A Thesis

Submitted to the College of Graduate Studies  
in partial fulfilment of the Requirements  
for the degree of  
Master of Laws

In the College of Law  
University of Saskatchewan

by

Anthony J. Jordan

Saskatoon, Saskatchewan, 1978

© 1978, Anthony J. Jordan



602000038542

The author has agreed that the Library, University of Saskatchewan, may make this thesis freely available for inspection. Moreover, the author has agreed that permission for extensive copying of this thesis for scholarly purposes may be granted by the professor or professors who supervised the thesis work recorded herein or in their absence, by the Head of the Department or the Dean of the College in which the thesis work was done. It is understood that due recognition will be given to the author of this thesis and to the University of Saskatchewan in any use of the material in this thesis. Copying or publication or any other use of the thesis for financial gain without approval by the University of Saskatchewan and the author's written permission is prohibited.

Requests for permission to copy or to make other use of material in this thesis in whole or in part should be addressed to:

The Dean of the College of Law  
University of Saskatchewan  
SASKATOON, Canada

## ABSTRACT

The general theme of the thesis is a broad examination of the nature and structure of the constitution of the Northwest Territories, including the relationship of the Territorial Government to the Federal Government and an examination of some possible future developments in the area.

Following a review of the constitutional history of the Northwest Territories and a summary of relevant legislation, past and present, Chapter Two contains an examination of the status of the Government of the Northwest Territories, concluding that it is a government in the true sense and not simply an agency of the Federal Government. It has powers similar to those exercised by the Provincial Governments but differs from them in its lack of responsible government and its continuing legal and practical domination by the Federal Government.

Some examination is made of the forces promoting change in the constitutional structure and status of the Territories. The two dominant forces examined are the existence of major non-renewable resources, particularly hydrocarbons, and the pressure for settlement of native land claims and native self-determination. An examination of the current law concerning control of natural resources and Federal Government policy statements indicates that the Federal Government has, and will endeavor to retain, virtually complete control over all non-renewable resources with a significant economic impact or national demand.

A general review of some of the proposals for the settlement of native claims leads to the conclusion that the claims will be settled in the same manner as previous claims by native people in Canada but will be coupled with changes in the governmental structures of the Territories, consistent with Canadian political traditions, designed to promote and guarantee the involvement of native people in government.

It is concluded that, for the most part, the constitution of the Northwest Territories will continue to evolve towards responsible government and full participation by the Territories as a member of the Confederation. That evolution will follow a pattern similar to that established by the development of the prairie provinces with the only significant differences being found in the role of native people in the political life of the community and the strengthened determination of the Federal Government to retain control of non-renewable resources for an indefinite period.



## CONTENTS

Acknowledgements . . . . .	i
Table of Cases . . . . .	ii
Preface . . . . .	vi
 I     A Brief Constitutional History of the Northwest Territories	 1
A. Introduction . . . . .	1
B. The Hudson's Bay Company: Acquisition and Transfer . .	2
C. The Evolution of Government: 1870-1905 . . . . .	9
D. The Evolution of the Modern Territorial Government . .	17
 II    The Nature of the Northwest Territories as a Political Unit and its Place within Confederation . . . . .	 31
A. The Legislative Assembly of the Northwest Territories as a Legislative Body . . . . .	33
1. The Judicial Nature of the Assembly . . . . .	34
2. The Operation and Powers of the Legislative Assembly . . . . .	52
B. The Executive Branch of the Government of the Northwest Territories . . . . .	75
 III   Control of Natural Resources in the Northwest Territories	98
A. Allocation of Authority over Resources: The Question of Ownership . . . . .	100
B. The Significance of Resource Control . . . . .	114
C. The Transfer of Resource Control . . . . .	121
D. Conclusions . . . . .	128
 IV    Native People and the Constitution of the Northwest Territories . . . . .	 130
A. Introduction . . . . .	130
B. The Present Status of Native People under the Law . . .	132
C. Land Claims Proposals in the Northwest Territories . .	153
1. The Inuit Proposals . . . . .	154
2. The Metis Approach . . . . .	176
3. The Dene Position . . . . .	181

D. The Territorial Government and Land Claims . . . . .	190
E. Conclusion . . . . .	196
V Directions of the Future . . . . .	199
A. The Position of the Legislative Assembly . . . . .	199
B. The Federal Position . . . . .	202
1. Non-renewable Resource Development . . . . .	205
2. Protection of Native Rights and Interests . . . . .	206
3. Division and Devolution in the Northwest Territories . . . . .	207
4. Responsible Government . . . . .	208
C. Conclusions . . . . .	209
List of References . . . . .	116
Figure 1 The Nunavut Territory . . . . .	155
Figure 2 Western Arctic Region . . . . .	156
Figure 3 Mackenzie Corridor . . . . .	178
Figure 4 Proposed Political Division of the Northwest Territories . . . . .	179

## ACKNOWLEDGEMENTS

I wish to express my gratitude to the College and Dean of Graduate Studies for the award of a graduate fellowship making possible the year of study resulting in this thesis.

For his generous help in guiding my research and providing critical comments on my work as it progressed, I am most grateful to my supervisor, Professor Howard McConnell of the College of Law. For providing the inspiration to examine the subject matter of this thesis, and for the benefit of his own thinking on it, I extend my gratitude for Mark M. de Werdt, a former Magistrate for the Northwest Territories and now of the Federal Department of Justice, Vancouver.

Others to whom gratitude is extended are, for her patience with me and her criticism of portions of my work, my wife Karen; and for their help in preparing the typescript, Karen Murfin and Margaret Brown of the Native Law Centre and Debbie Feader of the College of Law.

# TABLE OF CASES

Amodu Tigani v. Secretary of Southern Nigeria, [1921] 2 A.C. 399 (P.C.)	147
A.G. Alberta v. A.G. Can. (1888), 14 App. Cas. 295 (P.C.)	108n, 112
A.G. B.C. v. A.G. Can (1888), 14 App. Cas. 295 (P.C.)	101n, 106n
A.G. Can. and Rees v. Canard, [1975] 3 W.W.R. 1, 52 D.L.R. (3d) 548, [1970] 1 S.C.R. 170	42
A.G. Man. v. A.G. Can. (Manitoba Swamplands Case), [1904] A-C. 799 (P.C.)	106n
A.G. Man. v. C.P.R., [1958] S.C.R. 744	13n
A.G. N.S. v. A.G. Can., [1951] S.C.R. 31, [1950] 4 D.L.R. 369	48, 49, 74
A.G. Ont. v. Mercer (1881) 5 S.C.R. 538, reversed (1883), 8 App. Cas. 767, 52 L.J.P.C. 84	50, 78n, 91n, 101n, 102n, 108n
A.G. Sask. v. C.P.R. and A.G. Man. et al. [1953] A-C. 594, [1953] 3 D.L.R. 785, [1953] C.T.C. 281, 10 W.W.R. (R.S.)	13n, 51n
Trustees of the Balgonie Protestant Public School District v. C.P.R. (1901), 5 N.W.T. Rep. 123 (N.W.T.C.A.)	13n
Calder et al. v. A.G. B.C. (1973), 34 D.L.R. (3d) 145, [1973] 4 W.W.R. 1, [1973] S.C.R. 313	144, 150
Cherokee Nation v. State of Georgia (1831), 5 Peters 1, 30 U.S. 1 (U.S.S.C.)	146
C.P.R. v. Rural Municipality of Cornwallis et al. (1891), 19 S.C.R. 702, 7 M.R. 1	13n
Cardinal v. A.G. Alberta (1973), 6 W.W.R. 205, [1974] S.C.R. 695, 13 C.C.C. (2d) 1, 40 D.L.R. (3d) 553	71n, 73n
Chamberlist v. Collins (1962), 39 W.W.R. 65, 34 D.L.R. (2d) 414 (Y.T.C.A.)	69 n
Dinner v. Humberstone (1896), 26 S.C.R. 252	47
Re Eskimos, [1939] 2 D.L.R. 417 (S.C.C.)	71n, 135n
Fortier Arctic Ltd. v. Liquor Control Board, [1971] 5 W.W.R. 63 (N.W.T.T.C.)	84, 85, 89

Re Grey, [1918] 3 W.W.R. 111, 57 S.C.R. 150	45
Hodge v. The Queen (1883), 9 App. Cas. 117, 53 L.J.P.C. 1	35, 36, 44, 47, 50
Re Initiative and Referendum Act, [1919] A.C. 395, 48 D.L.R. 18 (P.C.)	49, 74
Johnson v. MacIntosh (1822), 21 U.S. 240 (U.S.S.C.)	141, 143, 151
Kanatewat et al. v. James Bay Development Corp. et al. (1973), 41 D.L.R. (3d) 1 (S.C.C.), refusing leave to appeal from an unreported decision of the Quebec Court of Appeal, Nov. 22, 1973, reversing an unreported decision of the Quebec Superior Court, Nov. 15, 1973	148n, 150
Kezar v. The Queen and Commissioner of the N.W.T., unreported, Dec. 13, 1976 (F.C.T.D.)	87, 89
The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick, [1892] A.C. 437 (P.C.)	50, 78n, 91n
Mann v. The Queen, [1966] S.C.R. 238, 47 C.R. 400, 56 D.L.R. (2d) 1, [1966] 2 C.C.C. 273	58n
Re McLeod, [1973] 5 W.W.R. 129 (N.W.T.S.C.)	84n
Morgan v. A.G. P.E.I. (1974), 5 N. & P.E.I.R. 129, 42 D.L.R. (3d) 603 (S.C.P.E.I., en banc.), affirmed, 7 N. & P.E.I.R. 129, 5 N.R. 455, [1976] 2 S.C.R. 349	101n
Myran et. al. v. R., [1976] 1 W.W.R. 196, [1976] 2 S.C.R. 137	73n
Natural Parents v. Superintendent of Child Welfare (1975), 60 D.L.R. (3d) 148, [1976] 1 W.W.R. 699, 21 R.F.L. 267, [1976] 2 S.C.R. 751	70n, 71n
Rural Municipality of North Cypress et al. v. C.P.R. (1903), 14 M.L.R. 382 (Man. C.A.), reversed, (1905), 35 S.C.R. 550	13n, 38, 46
Re Paulette's Caveat Application, [1973] 6 W.W.R. 115, 42 D.L.R. (3d) 8 (N.W.T.S.C.), reversed, [1976] 2 W.W.R. 193, 63 D.L.R. (3d) 1 (N.W.T.C.A.), affirmed, [1977] 1 W.W.R. 321, 72 D.L.R. (3d) 161, [1977] 2 S.C.R. 628	72n, 148, 150, 151n
Pfeiffer v. Commissioner of the N.W.T., unreported Feb. 21, 1977 (N.W.T.S.C.)	84, 85

Powell v. Appollo Candle Co. Ltd. (1885), 10 App. Cas. 282, 54 L.J.P.C. 7	36, 47
Purdy v. Kwaterowski, unreported, 1973 (N.W.T.S.C.)	84n
Reference to the Constitutional Validity of s.17 of the Alberta Act, [1927] S.C.R. 364	51n
R. v. Burah (1878), 3 App. Cas. 839	34, 36, 38, 44, 47 48, 50, 52, 112
R. v. Carroll, [1948] S.C.R. 126, [1948] 2 D.L.R. 705	93n
R. v. Chamberlist (1970), 72 W.W.R. 746, 12 D.L.R. (3d) 291 (Y.T.C.A.)	47
R. v. Drybones, [1970] S.C.R. 282, 9 D.L.R. (3d) 473, 71 W.W.R. 161, 10 C.R.N.S. 334, [1970] 3 C.C.C. 355	41, 42, 43
R. v. Frank, [1975] W.W.D. 156, 61 D.L.R. (3d) 327, 24 C.C.C. (2d) 321 (Alta. C.A.), reversed, [1977] 4 W.W.R. 294, 15 N.R. 487 (S.C.C.)	73n
R. v. Gonzales (1962), 37 C.R. 56, 37 W.W.R. 257, 32 D.L.R. (2d) 290, 132 C.C.C. 237 (B.C.C.A.)	41
R. v. Isaac (1975), 13 N.S.R. (2d) 460 (N.S.C.A.)	149
R. v. Kruger and Manuel, [1974] 6 W.W.R. 206, 19 C.C.C. (2d) 162, 51 D.L.R. (3d) 435 (B.C. Co. Ct.), reversed, [1975] 5 W.W.R. 167, 24 C.C.C. (2d) 120, 60 D.L.R. (3d) 144 (B.C.C.A.), affirmed, [1977] 4 W.W.R. 300, 15 N.R. 495 (S.C.C.)	150
R. v. Kogogolak (1959), 31 C.R. 12, 28 W.W.R. 376 (N.W.T.T.C.)	72n
R. v. Lynn Holdings Ltd. (1969), 68 W.W.R. 64 (Y.T. Mag. Ct.)	46, 49
R. v. Massey-Harris Co. (1905), 9 C.C.C. 25, 1 W.L.R. 45, 6 Ten. L. Rep. 126 (N.W.T.C.A.)	59n
R. v. Sigereak EL-53 (1966), 56 W.W.R. 478, [1966] S.C.R. 645	73n
Riel v. R. (1885), 10 App. Cas. 675 (P.C.)	112
Royal Bank v. Scott and the Commissioner of the N.W.T., [1971] 4 W.W.R. 491, 20 D.L.R. (3d) 728 (N.W.T.T.C.)	81, 83, 88, 90n

St. Catherines Milling and Lumber Co. v. The Queen (1888), 14 App. Cas. 46, 58 L.J.P.C. 54	123n, 143, 147
Re Silver Brothers: A.G. Que. v. A.G. Can., [1932] A.C. 514, [1932] 2 D.L.R. 673, [1932] 1 W.W.R. 764 (P.C.)	91n, 92n, 147
Re Simonson and Hodgson (1975), 63 D.L.R. (3d) 560 (N.W.T.S.C.)	31n, 97n
In re Southern Rhodesia, [1919] A.C. 211 (P.C.)	52, 134n
Tee-Hit-Ton Indians v. United States (1955), 348 U.S. 272 (U.S.S.C.)	145
In re Transfer of Natural Resources to the Province of Saskatchewan, [1931] S.C.R. 263, affirmed [1932] A.C. 28 (P.C.)	111n
United States v. Santa Fe Pacific Railway Co. (1941), 314 U.S. 339 (U.S.S.C.)	150
Vandall et al. v. Registrar of Titles, unreported, 1971 (N.W.T.T.C.)	84n
City of Yellowknife v. Public Service Alliance of Canada (1975), 63 D.L.R. (3d) 753, 13 N.R. 205 (F.C.A.), affirmed, 14 N.R. 72, [1977] 2 S.C.R. 729	31n, 44n, 45n, 64n

## PREFACE

Broad questions of the nature of the constitution of the Northwest Territories have received little attention from lawyers or academics of any discipline since Alberta and Saskatchewan were carved out of the Territories in 1905. The research or analysis which has been done has, for the most part, arisen out of political struggles in the north which have attracted very little attention in southern Canada.

In recent years, however, the increased interest in natural resources, the assertion of native land claims and the rise of an articulate local leadership have led to the need for a closer examination of the Territories' constitutional and political problems. At a more immediate level the development of a Territorial civil service, the increase in commercial activity and the expansion of the the legal profession have brought a number of immediate constitutional questions to the fore.

An attempt is made on the following pages to examine the present constitutional structures of the Northwest Territories to serve as a reference point in solving current questions, as well as to show the foundation upon which future changes must be built. The examination is primarily from a lawyer's viewpoint. To the extent that it looks to the future it focuses on structures rather than the political values which will be reflected by those structures. To the extent that values have had to be examined an attempt has been made to do so critically but objectively.



Events in the political area have moved at such a pace of late that it is impossible to produce a completely up to date examination. With regard to purely legal sources, judgements and statutes, the writer has closed his examination at July 1, 1977. In the political field some reference is made to events after that date and the effective date of completion of the research may be taken as September 30, 1977.

## CHAPTER ONE

### A BRIEF CONSTITUTIONAL HISTORY OF THE NORTHWEST TERRITORIES

#### A. Introduction

Recent events in the Northwest Territories, the development of hydrocarbon fuel resources, debate over a northern gas pipeline and the activity of native organizations in pressing their claims to land and political power, have focused the attention of Canadians on the North as never before. Canadians are beginning to see the North as not simply a romantic frontier but a political entity complete with problems of authority and struggles for power. It becomes important, in the context of these issues and in the context of the debate over future development of government in the Northwest Territories, to examine the nature of the Territorial Government as it now exists. This thesis will attempt that examination, focusing upon the status of the legislature, its relationship to the executive branch and the relationship of the Territorial Government generally to the Government of Canada. This discussion, together with a review of the constitutional implications of two of the Territories' current major problems - native land claims and resource development - will, it is hoped, give some indication of the options available for future constitutional development in the Territories and the respective merits of those options.

The purpose of this chapter is to provide a brief outline of the constitutional history of the Northwest Territories. The review will

focus on the constitutional documents which relate to the Northwest Territories and the changes which they effected in the structure of the political and governmental institutions of the Territories and the operation of those institutions.

This is not a political history. Accordingly, many of the developments which have taken place will be presented without any, or any extensive, discussion of the political, social and economic context in which they occurred. Nonetheless, it is to be hoped that by providing a legal historical background the reader will be in a better position to understand the present constitution of the Northwest Territories and, as well, derive some basis for evaluating the alternatives for the future, their merits and the likelihood of their coming to pass. History does tend to repeat itself, a phenomenon which, it will be seen, applies to the constitutional evolution of the Northwest Territories. The repetition is not done with mirrors and the writer does not pretend that there is any cyclical inevitability in matters such as those discussed in this thesis. Events now taking place in the Territories seem to indicate a continued change in governmental structures with one of the alternatives for future change being just such a repetition of history. Whether that is a desirable solution to the problem now facing the people of the North is debatable, and is, indeed, being hotly debated. This review can, perhaps, lend some clarity and background to the debate.

#### B. The Hudson's Bay Company: Acquisition and Transfer

The area under consideration in this thesis is the Northwest Territories as presently constituted, being that portion of Canada north

of the 60th degree of latitude, including the islands of the Arctic Archipelago and the Hudson Bay, but excluding lands included in the provinces of Quebec and Newfoundland and the Yukon Territory.<sup>1</sup> For purposes of this history, however, the area under discussion will include all those areas which were joined to Canada by the Order in Council of June 23, 1870 admitting Rupert's Land and the Northwestern Territory to Canada<sup>2</sup> and the Order in Council of July 31, 1880, which admitted to Canada all remaining British possessions in North America except Newfoundland.<sup>3</sup> Numerous boundary changes have removed areas, and in one case added an area back to the Territories, to produce the present boundaries. Through this chapter all references to the Territories are to the Territories as they existed at the time of the events under discussion. No consideration will be given to disputes with other nations concerning the ownership of or sovereignty over any parts of the Territories, so that the area will include all territory claimed by Canada as a part of the Northwest Territories.

The early legal history of the area, arising out of initial discoveries and settlement and transactions between Britain, France and the United States is, as interesting as it may be, of little significance for purposes of this thesis.<sup>4</sup> In 1670 a large portion of British North America was included in the grant made by the letters patent incorporating

---

<sup>1</sup>The complete description is found in the Northwest Territories Act, R.S.C. 1970, c. N-22, s. 2.

<sup>2</sup>R.S.C. 1970, App. II, no. 9.

<sup>3</sup>R.S.C. 1970, App. II, no. 14.

<sup>4</sup>For a brief history of these transactions and a discussion of some of their legal consequences see: McCaul C.C., The Constitutional Status of the North-West Territories of Canada (1884), 4 Can. Law Times 1, 49.

the Governor and Company of Adventurers of England Trading into Hudson Bay.<sup>5</sup> This area, Rupert's Land, conveniently described as the lands drained by rivers flowing into the Hudson Bay, remained under company rule for the next 200 years. The company was declared by their charter to be "absolute Lords and proprietors"<sup>6</sup> with power to "make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances as to them . . . shall seem necessary and convenient for the good government of the said company . . ."<sup>7</sup> The company was given specific powers to appoint Governors and other officers to administer justice in all causes, civil or criminal, respecting all persons within the Territory, according to the laws of England, and to defend the Territory and to declare war or make peace with non-Christian princes.<sup>8</sup>

The principal value of the company's charter was in its trading monopoly. Its trading rights were extended in area to cover the balance of what became Western Canada and the mainland of the two Territories by a license granted in 1821 and renewed for a further 21 years in 1838.

By the middle of the 19th century the company's approach to the area which it governed was being seriously questioned. With the exception of a settlement in the Red River district<sup>9</sup> of Manitoba the company had retained all of Rupert's Land and prevented or discouraged settlement and

---

<sup>5</sup> Oliver, E.H. (ed.) The Canadian North-West - Early Development and Legislative Records (1915, Canadian Archives), p. 135. References hereafter to the Hudson's Bay Company or simply, the company, are to this organization.

<sup>6</sup> Ibid, p. 144.

<sup>7</sup> Ibid, p. 145.

<sup>8</sup> Ibid, p. 150.

<sup>9</sup> Grant to the Earl of Selkirk, June 12, 1811, in Oliver, op. cit., fn. no. 5, at p. 154.

the growth of agricultural activity. Government had remained strictly a company affair with the exception of the Red River where the Council of Assiniboia had been established with some powers of Government. In 1857 the United Kingdom House of Commons established a committee "to consider the state of those British possessions in North America, which are under the administration of the Hudson's Bay Company or over which they possess a license to trade".<sup>10</sup>

The solution to the problem of what to do with this vast unsettled interior of British North America presented itself a very few years later in the movement to unite the British Colonies. The goal of a union from Atlantic to Pacific required the inclusion of the interior before it could become dominated by expansion from the United States.

The Quebec resolutions of 1864<sup>11</sup> included the proposition that was later to become section 146 of the British North America Act of 1867:

- s. 146 It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Addresses from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.<sup>12</sup>

---

<sup>10</sup>Debates, House of Commons (U.K.), February 5, 1857.

<sup>11</sup>Pope, Joseph, Confederation Documents (Toronto, 1895), p. 40, resolution #10.

<sup>12</sup>British North America Act, 1867, 30-31 Vict., c. 3 (U.K.); R.S.C. 1970, App. II. no. 5.

Steps were taken toward the admission of Rupert's Land and the North-western Territory almost immediately after Confederation. The first Address of the Senate and the House of Commons to the Queen requesting admission of the area to Canada was passed in December, 1867.<sup>13</sup> Thereafter, negotiations were conducted between the company and the British and Canadian Governments and legislation was passed to prepare the way for the transfer.

This was not a commercial transaction, as much as it may have been considered one by the Federal Government. The British North America Act had provided for the admission of the Territory into the union, not its purchase, and the legislation reflected this.

The Rupert's Land Act, 1868,<sup>14</sup> was Imperial legislation providing for the acceptance by the Queen of a surrender of the Hudson's Bay Company's rights under their charter and the subsequent admission into the union. It is clear from the statute that Britain saw itself only as a medium for the transaction between the company and Canada, by the requirements that the surrender not be accepted until the terms of admission had been agreed upon, that the Order in Council admitting Rupert's Land to Canada be made within one month of the acceptance of the surrender and, that no charges be imposed by the terms of the surrender on the Consolidated Fund of the United Kingdom.

Apart from the details of the transfer there remained the problem of governing the area when the company's authority came to an end. The Rupert's Land Act provided that upon admission "it shall be lawful for

---

<sup>13</sup>R.S.C. 1970, App. II, p. 264.

<sup>14</sup>31-32 Vict., c. 105 (U.K.); R.S.C. 1970, App. II, no. 6.

the Parliament of Canada . . . to make, ordain, and establish within the land and territory so admitted . . . all such laws, institutions, and ordinances, and to constitute such courts and officers as may be necessary for the peace, order, and good government of Her Majesty's subjects and others therein."<sup>15</sup>

In anticipation of having this authority the Canadian Parliament then passed the Temporary Government of Rupert's Land Act of 1869<sup>16</sup>, "to make some temporary provision for the civil government of such territory until more permanent arrangements can be made by the government and legislature of Canada."<sup>17</sup> That Act provided that the Governor in Council might appoint a Lieutenant Governor of the North-west Territories and authorize him:

to make provision for the administration of justice therein, and generally to make, ordain, and establish all such laws, institutions and ordinances as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein.

The Lieutenant Governor was charged with administering the government under instructions given him from time to time by Order in Council, and the Act made provision for appointment by the Governor of a Council of from seven to fifteen members to assist the Lieutenant Governor in his duties.

Neither the transfer of governing authority nor the establishment of the new government went as smoothly as had been hoped. The local residents, having been accustomed to having some influence over the Company's rule through the Council of Assiniboia, took umbrage at the prospect of

---

<sup>15</sup>Ibid, s. 5.

<sup>16</sup>Stats. Can. 1869, c. 3; R.S.C. 1970, App. II, no. 7.

<sup>17</sup>Ibid, Preamble.



Canadian rule, in which they would apparently have no voice at all. In particular, many were concerned about the status of their land holdings, a concern which seemed justified when the Canadian government sent surveyors to the Red River in advance of the transfer. This issue involved the rights of the French-speaking Roman Catholic Metis. The causes and conduct of the Red River rebellion have been dealt with adequately elsewhere. The immediate result was the establishment of the Province of Manitoba, to come into existence as soon as the area was joined to Canada.<sup>18</sup>

Manitoba was to be a province in an important respect differing from the others. The Dominion government retained control of the land resources of the new Province which would under the British North America Act have been under the administration and control of the Provincial Government.<sup>19</sup>

The Federal Government had, by exercising their powers to make laws for the area to be annexed, in fact created two new forms of government in the North-west. Questions as to the ability of Parliament to do so were resolved by the British North America Act, 1871<sup>20</sup> which, after reciting that doubts had been entertained concerning the power of Parliament to create new provinces in the Territories, confirmed that power and the power "to make provision for the administration, peace, order and good government of any territory not for the time being included in any Province."<sup>21</sup> The Act also ratified the Manitoba Act and the Temporary Government of Rupert's Land Act from the dates upon which they had received royal assent. In the

---

<sup>18</sup> Manitoba Act, 1870, Stats. Can., 1870, c. 3; R.S.C. 1970, App. II, no. 8.

<sup>19</sup> There are differences in the wording of the two Acts. Section 109 of the British North America Act gave the provinces all "lands, mines, minerals, and royalties", while section 30 of the Manitoba Act vested in the Crown, to be administered for the purposes of the Dominion, "all ungranted and waste lands in the province."

<sup>20</sup> 34-35 Vict., c. 28 (U.K.); R.S.C. 1970, App. II, no. 11.

<sup>21</sup> Ibid, s. 4.

meantime, the surrender from the Hudson's Bay Company had been accepted<sup>22</sup> and the area, including the Northwestern Territory, had been admitted to Canada. The Order in Council effecting the union<sup>23</sup> had given to the Parliament of Canada the "full power and authority to legislate for the future welfare and good government of the said Territory" which was later confirmed by the British North America Act, 1871. Pursuant to this power and the provisions of the Temporary Government Act the Federal Government appointed a Lieutenant-Governor for the Northwest Territories, Adams G. Archibald, who was also the Lieutenant Governor for Manitoba.

C. The Evolution of Government: 1870 - 1905

As the province of Manitoba encompassed the area of the greatest white and Metis population, the Federal Government became somewhat lax in providing effective government for what remained of the Northwest Territories. The Temporary Government Act had initially been designed as just that, temporary,<sup>24</sup> but was soon extended into 1871.<sup>25</sup> When Archibald was

---

<sup>22</sup>The surrender was accepted by Order in Council of June 22, 1870, and is found attached to the Order in Council admitting Rupert's Land and the Northwestern Territory to Canada of June 23, 1870; R.S.C. 1970, App. II, no. 9.

<sup>23</sup>Ibid.

<sup>24</sup>Section 7 provided that it should only remain in force until the end of the next session of Parliament.

<sup>25</sup>Manitoba Act, op. cit., fn. 18, s. 36.

appointed Lieutenant Governor he was not given any legislative powers<sup>26</sup> and no council was appointed to assist him until December, 1872.<sup>27</sup>

The legislative powers conferred on this council<sup>28</sup> were broad, but contained limitations which established, in some measure, a pattern for the future. The Lieutenant Governor in Council had powers to make provisions for the administration of justice and generally to legislate for the peace, order and good government of the Territories, provided that the powers granted were not greater than those of a provincial legislature. There was no authority to regulate public lands or impose taxes, and all ordinances would come into effect only when approved by the Governor in Council, subject even then to a power of disallowance exercisable within two years. While the details of the grant of legislative powers were to change often in the next few decades, the central features of territorial government until the advent of responsible government were established; the Lieutenant Governor administered on instructions from Ottawa; legislative powers included most local matters to the same extent that they were

---

<sup>26</sup>The first legislative power he received was given in August of 1871 to allow him to deal with infectious diseases. The clear need for some power was demonstrated by an incident soon after Archibald took office. A smallpox epidemic broke out on the prairies and, not having a copy of the Temporary Government Act, Archibald hastily appointed his own Legislative Council and proceeded to have it pass legislation to deal with the matter, which he then enforced. See correspondence between Archibald and Joseph Howe, Secretary of State for the Provinces, October 22, 1870, and following in Oliver, E.H., fn. 5, at p. 976, and Thomas, L.H., The Struggle for Responsible Government in the N.W.T., 1870-1897 (U. of T. Press, 1956) pp. 1-15.

<sup>27</sup>Order in Council of December 28, 1872. Only two of the eleven members appointed were residents of the Territories.

<sup>28</sup>The Temporary Government Act was reenacted by Stats. Can., 1871, c. 16 and the legislative powers given by Order in Council of February 12, 1873.

within the competence of a provincial legislature, save lands and taxation, thus producing an economic dependence on the central government; the Dominion Parliament retained an overriding legislative authority.

Aspects of government which were not in the hands of the Territorial executive and legislature became, for the most part, the responsibility of the Minister of the Interior. The Act creating the Department of the Interior in 1873<sup>29</sup> charged the Minister with control and management of the Territories, Indians and Indian lands. Subject to redistributions of departmental authority this situation has remained to the present, these responsibilities now being in the hands of the Minister of Indian Affairs and Northern Development.<sup>30</sup>

Federal enactments in relation to the government of the Territories were consolidated in the first North-west Territories Act, 1875.<sup>31</sup> The consolidation and amendments made at the time contemplated the evolution and expansion of the role of the Territorial Government. A formula was built into the Act for the Council (which was reduced to 5 appointed members) to become an elected body designated the Legislative Assembly of the Northwest Territories.<sup>32</sup> The powers of the Council were now enumerated in the legislation and included power to levy taxes for local and municipal

---

<sup>29</sup>Stats. Can. 1873, c. 34.

<sup>30</sup>R.S.C. 1970, c. I-7, amended R.S.C. 1970, (2nd supp.), c. 14.

<sup>31</sup>Stats. Can. 1875, c. 49.

<sup>32</sup>Ibid, s. 13. Whenever an area of up to 1000 square miles had a population of 100 adult males, excluding aliens and unenfranchised Indians, it could elect a member to the Council. When the number of elected members reached 21 they alone were to form the Assembly with all the powers enjoyed by the Council.

purposes and to create municipalities and school districts.<sup>33</sup>

The legislative powers of the Lieutenant Governor in Council were also, of course, subordinate to other federal legislation and could not conflict with Acts of the Dominion Parliament. The effect of this was to considerably limit the range of Territorial legislation as matters such as intestate succession, real estate, wills, married women's property, registration of deeds, the administration of justice and regulation of alcohol were dealt with in detail in the Northwest Territories Act.

The process of change which ensued was slow, but steady, characterized by numerous minor changes in the structure and powers of the Northwest Territories government, some boundary changes,<sup>34</sup> and an increasing role for the Territories at the national level.<sup>35</sup> The developments followed events in the Northwest Territories<sup>36</sup> and the general growth of population following construction of the Canadian Pacific railway. There was a steady erosion of the detailed federal legislation concerning matters of local interest as the Council and, after 1888, the Assembly, passed its own legislation. Throughout the period, however, the Federal Government held tightly to its power to regulate land use and to direct the Lieutenant

---

<sup>33</sup> Education legislation was subject to the right of Protestant and Roman Catholic minorities to separate schools, a provision which was hotly debated at the creation of Alberta and Saskatchewan.

<sup>34</sup> The Keewatin, located between the then boundaries of Ontario and Manitoba, was established as a separate Territory by Stats. Can., 1876, c. 21, and Manitoba was extended in a westerly direction by Stats. Can. 1881, c. 14. In 1898, the Yukon Territory was established, Stats. Can. 1898, c. 6, followed by the return of the Keewatin to the N.W.T. by a proclamation of July 24, 1905.

<sup>35</sup> Four constituencies for the House of Commons were created in the Districts of Alberta, Saskatchewan, East Assiniboia and West Assiniboia by the North-west Territories Representation Act, Stats. Can. 1886, c. 24. Provision for two seats in the Senate was made by Stats. Can. 1887, c. 3.

<sup>36</sup> For example, a system of gun and ammunition control was introduced after the Northwest Rebellion by Stats. Can., 1885, c. 51.

Governor in his administration.

These years of western development and settlement were of major importance to the nation as a whole, as the resources of central Canada were committed to building the railroad and settling the Prairie agricultural belt. As the population of the N.W.T. increased, so did the measure of their control over local matters with the Federal Government directing itself to immigration and transportation. Under the Dominion Lands Act<sup>37</sup> and agreements with the railroads vast tracts of land were alienated or removed from the range of future Territorial taxing powers.<sup>38</sup>

By 1888 the Assembly was wholly elective and the Lieutenant Governor no longer sat as a member of the Legislature. The Supreme Court of the Northwest Territories had been established and the laws of Canada and

---

<sup>37</sup> Stats. Can. 1872, c. 23.

<sup>38</sup> Paragraph 16 of the agreement between the Government of Canada and the Canadian Pacific Railway, ratified by the Canadian Pacific Railway Act, Stats. Can. 1880, c. 1, protected all C.P.R. lands in the Northwest Territories from taxation for 20 years or until sold or occupied, and protected their lands and equipment used in the operation of the railroad from taxation in perpetuity. This was a matter of obvious concern to the local governments later established in the Northwest Territories and the expanded portion of Manitoba, and resulted in a great deal of litigation.

Rural Municipality of North Cyprus et al. v. C.P.R. (1903), 14 M.L.R. 382 (Man. C.A.), reversed, (1905), 35 S.C.R. 550;

C.P.R. v. Rural Municipality of Cornwallis (1891), 19 S.C.R. 702; 7 M.R.1; Trustees of the Balgonie Protestant Public School District v. C.P.R. (1901), 5 N.W.T. Rep. 123 (C.A.N.W.T.);

Attorney General for Saskatchewan v. C.P.R. and Attorney General for Manitoba et al. (intervenors), [1953] A.C. 594 (P.C.);

Attorney General for Manitoba v. C.P.R., [1958] S.C.R. 744.

England applicable to the Territories clarified.<sup>39</sup> In that year the provisions relating to the Constitution of the Assembly, including establishment of the office of Speaker, were reformulated and a comprehensive enumeration of its powers set out. More significant were the first tentative steps towards participation by elected members in the executive functions of government. The Lieutenant Governor was required to select four members of the Assembly to constitute an advisory council on matters of finance, to hold office at the pleasure of the Lieutenant Governor.<sup>40</sup>

With a foot in the door of responsible government the Assembly and the Advisory Council on Finance began to move more expeditiously towards that goal and, ultimately, to provincial status.<sup>41</sup> The first supply bill submitted to the Assembly included provisions for the appropriation of the annual federal grant to the Territories. This served to precipitate the first constitutional crisis and the ensuing resignation of two successive Advisory Councils.<sup>42</sup> The Federal Government followed suit by a . . . grudging move to more local autonomy through an increase in the size of the Assembly, the abolition of appointed legal advisors who sat with the Assembly, provisions allowing the Assembly to alter electoral districts and allowing the Lieutenant Governor to dissolve the legislature and call elections and, more important, this addition to the legislative powers:

---

<sup>39</sup> Stats. Can. 1886, c. 25. The laws of England of July 15, 1870, were to apply in the Northwest Territories unless inappropriate, until altered, and all the laws of Canada were to be in force in the Territories unless by their own terms inapplicable.

<sup>40</sup> Stats. Can. 1888, c. 19, s. 13.

<sup>41</sup> For details of this period see Thomas, L.H., op. cit. fn. 26 and Lingard, C.C., Territorial Government in Canada (U. of T. Press, 1946).

<sup>42</sup> For details of these events see Thomas, op. cit. fn. 26, p. 161 et seq., and Oliver, E.H., op. cit. fn. 5, p. 1101 et seq.

- s. 13(12) The expenditure of Territorial funds and such portion of any monies appropriated by Parliament for the Territories, as the Lieutenant Governor is authorized to expend by and with the advice of the Legislative Assembly or of any Committee thereof;<sup>43</sup>

The Committee of the Legislature referred to in that section was undefined and without effective power, yet the Assembly now had some measure of control over the distribution of the federal grant in aid of the Government. The Advisory Council on Finance was finally abolished in 1894 and the situation was clarified by the creation of an Executive Committee of four members selected by the Assembly from its ranks to advise the Lieutenant Governor on matters of finance.<sup>44</sup>

Finally, in 1897, the long sought objective of responsible government was reached with amendments creating an Executive Council to be chosen by the Lieutenant Governor to serve at his pleasure, and the vesting of the powers of the Lieutenant Governor with the advice of the Executive Committee in the Lieutenant Governor in Council.<sup>45</sup>

The skeleton of the legislation implementing these changes in government and authority cast only a pale shadow of the process which had led to them and which was to continue in a few years to see the establishment of Alberta and Saskatchewan. The accounts by Thomas,<sup>46</sup> of the struggle for

---

<sup>43</sup>Stats. Can. 1891, c. 22, s. 6.

<sup>44</sup>The old Advisory Council had been left in existence as certain duties had been imposed upon it by Territorial Ordinances. See Thomas, op. cit. fn. 26 at p. 200; Debates, House of Commons, 1891, col. 1760; Stats. Can. 1894, c. 17, ss. 14, 17, 18.

<sup>45</sup>Stats. Can. 1897, c. 28, s. 17.

<sup>46</sup>Op. cit. fn. 26.



responsible government, and Lingard,<sup>47</sup> of the move to provincehood, provide more in the way of the flesh of change. They show the interaction of personalities and factions, the effects of national policies and party attitudes and the steady determination of those who worked through the years to develop the political structures and practices which would prepare the prairies to take their place among the provinces. Each minor legislative change on this path has its own background of initiatives and rebuff, debate and compromise which have been left out of this account. The reader with a broader knowledge of the history of the prairies during this period and of recent events in the Northwest Territories will see a number of parallels which are reflected in the similarities in legislative changes of the two eras.

After responsible government, changes continued to be made in the Northwest Territories Act, increasing legislative authority and fiscal responsibility,<sup>48</sup> leading finally to the passage of the Alberta Act<sup>49</sup> and the Saskatchewan Act<sup>50</sup> in 1905. Again, the new provinces carved out of the Territories were left without control of their land resources, but in all other respects had become equal members of Confederation.<sup>51</sup>

---

<sup>47</sup>Op. cit. fn. 41.

<sup>48</sup>Stats. Can. 1902, c. 24; Stats. Can. 1903, c. 40 and c. 41.  
See Lingard, op. cit. fn. 41 for a detailed account of this period.

<sup>49</sup>Stats. Can. 1905, c. 3; R.S.C. 1970, App. II, no. 19.

<sup>50</sup>Stats. Can. 1905, c. 42; R.S.C. 1970, App. II, no. 20.

<sup>51</sup>Interestingly, the question of land resources in the new provinces focussed in large measure on the exception from taxation given to the C.P.R. but was over-shadowed by the controversy over the separate school issue. See Lingard, op. cit. fn. 41.

#### D. The Evolution of the Modern Territorial Government

With the creation of the new provinces Territorial Government ceased to be an issue in Canada, so much so that it was to prompt a remark by then Prime Minister St. Laurent in 1953 that, "Apparently we have administered these vast Territories of the North in an almost continuing state of absence of mind".<sup>52</sup>

With no major population centres, and little or no commercial or industrial activity, the Northwest Territories reverted to the government structures of 1870. The amendments to the Northwest Territories Act<sup>53</sup> following the creation of Alberta and Saskatchewan bear a striking resemblance to the Temporary Government of Rupert's Land Act of 1869<sup>54</sup> with a chief-executive officer, styled the Commissioner<sup>55</sup> and a council composed of four members appointed by the Governor in Council with power to legislate on matters designated by the Governor in Council. The Commissioner was again to sit as a member of the legislative body, and the time for disallowing ordinances was increased to two years. The Supreme Court of the Northwest Territories was abolished and the practice of appointing Stipendiary Magistrates reintroduced. As the first capital of the Territories had been in Manitoba, so now it was in Ottawa.<sup>56</sup> The first Commissioner to be appointed was the Deputy Commissioner of the

---

<sup>52</sup>Debates, House of Commons, 1953, p. 698.

<sup>53</sup>Stats. Can. 1905, c. 27.

<sup>54</sup>Op. cit. fn. 16.

<sup>55</sup>The use of the title "Commissioner" began in the Yukon with the Yukon Territory Act, Stats. Can. 1898, c. 6, s. 3.

<sup>56</sup>Proclamation of July 24, 1905, effective September 1, 1905. Canada Gazette, volume 39, p. 371.

Royal Canadian Mounted Police, resident in Ottawa.

That done, the Northwest Territories was promptly forgotten by the Federal Government. Many of the governmental problems which might have arisen were neatly avoided by the simple expedient of annexing large portions of the Territories to the provinces of Manitoba, Ontario and Quebec.<sup>57</sup> The level of government activity was so low that no Council was appointed until 1921,<sup>58</sup> though there were a number of amendments made to the Northwest Territories Act to facilitate the administration of justice<sup>59</sup> and, later, to expand the powers of the Council to include the licensing of explorers and scientists,<sup>60</sup> the imposition of a fur export tax<sup>61</sup> and the preservation of game.<sup>62</sup>

These additional powers reflect the matters which were of immediate concern in the Territories, with its economy and life style based primarily on hunting and trapping. There were no major developments or population increases similar to those which the prairies had seen in the three decades before 1905. There was, however, a slow and steady increase of the white

---

<sup>57</sup> For an account of this period see Zaslow, Morris, A Prelude to Self-Government; The N.W.T., 1905 - 1939, in Underhill, Frank (ed.), The Canadian Northwest: Its Potentialities, (U. of T. Press, 1959). Manitoba Boundaries Extension Act, Stats. Can. 1912, c. 32; Ontario Boundaries Extension Act, Stats. Can. 1912, c. 40; Quebec Boundaries Extension Act, Stats. Can. 1912, c. 42.

<sup>58</sup> Zaslow, Morris op. cit. fn. 57, at p. 91.

<sup>59</sup> Stats. Can. 1907, c. 32; Stats. Can. 1908, c. 49; Stats. Can. 1921, c. 40 (appointment of a Deputy Commissioner); Stats. Can. 1923, c. 21; Stats. Can. 1939, c. 38; Stats. Can. 1940, c. 36; Stats. Can. 1948, c. 20.

<sup>60</sup> Stats. Can. 1925, c. 48.

<sup>61</sup> Stats. Can. 1927, c. 64.

<sup>62</sup> Stats. Can. 1948, c. 20.

population attracted by the commercial potential of the fur trade and, increasingly, by significant non-renewable resource developments: oil at Norman Wells, gold near Yellowknife and uranium on Great Bear Lake.<sup>63</sup> As the population grew and became concentrated in the mining centres there was a demand for increased government services and a voice in local, territorial and national affairs.<sup>64</sup>

The first major changes in the structure of the Territorial Government came in 1951<sup>65</sup> with the expansion of the Council to eight members, including three to be elected from the western part of the Territories. The Commissioner was required to summon at least two sessions of the Council annually, at least one of which was to be held in the Territories. Further substantial amendments were passed in 1952,<sup>66</sup> and, before these came into force on April 1, 1955, changes were made again in 1954.<sup>67</sup> The effect of these was to add one elected member to the Council, to remove much of the detailed federal legislation concerning local matters, making room for Territorial ordinances, to give the Commissioner the management of some public lands and roads and, most significantly from a fiscal viewpoint, to give the Territorial Government management of the liquor system. The stipendiary Magistrates'

---

<sup>63</sup>For a review of economic developments in the Territories see Zaslow, *op. cit.*, fn. 57; Rae, K.J., The Political Economy of the Canadian North (U. of T. Press, 1968), and Rae, K.J., The Political Economy of Northern Development (Information Canada, 1976).

<sup>64</sup>The Northwest Territories Today, a reference paper for the Advisory Commission on the Development of Government in the Northwest Territories (1965), p. 80 et seq.

<sup>65</sup>Stats. Can. 1951, c. 21.

<sup>66</sup>Stats. Can. 1952, c. 46, also cited as R.S.C. 1952, c. 331.

<sup>67</sup>Stats. Can. 1953-54, c. 8.

Courts were abolished and replaced by Police Magistrates' Courts and a Superior Court of Record, the Territorial Court. Management of Territorial funds was placed in the hands of the Commissioner in Council through the creation of the Northwest Territories Revenue Account in the Consolidated Revenue Fund of Canada. The Minister of Northern Affairs and National Resources retained a deciding voice, however, and no deficits in the fund were permitted.

Notwithstanding these and other changes in fiscal arrangements<sup>68</sup> and legislative powers,<sup>69</sup> government in the Territories remained very much a federal task. The Government of the Northwest Territories paid for an increasing number of provincial-type services while the services themselves were provided by the Department of Indian Affairs and Northern Development or other federal departments. By July, 1966, there were still only fifty territorial civil servants, involved primarily in operating the liquor system.<sup>70</sup>

---

<sup>68</sup>In 1952 the first tax rental agreement between the Federal and Territorial Governments was entered into (Rae, J.K., Political Economy of the Canadian North, op. cit. fn. 63). Appropriation powers were increased to include all Territorial monies (Stats. Can. 1955, c. 21) and the Commissioner in Council was given power to borrow money subject to the approval of the Governor in Council (Stats. Can. 1957-58, c. 30).

<sup>69</sup>Stats. Can. 1960, c. 20. extended the application of Territorial Ordinances to Indians and Eskimos, subject to protection of hunting and fishing rights. These provisions were analogous to section 88 of the Indian Act, R.S.C. 1970, c. I-6 and hunting provisions of the Natural Resources Agreements, British North American Act, 1930, R.S.C. 1970, App. II, no. 25.

<sup>70</sup>Report of the Advisory Commission on the Development of Government in the Northwest Territories (1966, Ottawa), p. 49 (hereafter cited as the Carrothers Commission Report).

From the early 1960's to the present, events moved at a considerably faster pace in respect of constitutional changes and growth of the Territorial civil service. In the early part of the decade the residents of the Territories, and especially those of the more developed MacKenzie district, increased their agitation for greater autonomy, the extension of the franchise throughout the Territories and the establishment of a resident Commissioner in a new Mackenzie Territory separated from the Eastern and High Arctic. In 1962 the Federal Government finally made provision for a member of the House of Commons from the Northwest Territories.<sup>71</sup> In 1963, at the request of the Territorial Council two Bills were introduced in the House of Commons<sup>72</sup> having the effect of creating a Mackenzie Territory with a capital at Fort Smith and the same basic structure as the then Northwest Territories, and the Nunassiat Territory in the east with a slightly more primitive government establishment. It soon became apparent that there was no consensus in the Territories with regard to division and both Bills were allowed to die on the order paper.

The result was a request by the new Council, partly elected in 1964, for the appointment by the Federal Government of a commission of inquiry into the Territorial Government.<sup>73</sup> By Order in Council of June 3, 1965 the Government appointed A.W.R. Carrothers, then Dean of Law at the

---

<sup>71</sup>An act to amend the Representation Act, Stats. Can. 1962, c. 17. Prior to this the member from the Yukon - MacKenzie River, a riding created by enlargement of the Yukon riding, had represented some of the people of the Mackenzie district from 1947 to 1952, when a separate riding was established in the Mackenzie district.

<sup>72</sup>Bills C-83 and C-84, 1963, first session, 26th parliament.

<sup>73</sup>Debates, House of Commons, May 11, 1965, p. 1143 et seq.

University of Western Ontario, Jean Beetz, now a Judge of the Supreme Court of Canada, and John Parker, now Deputy Commissioner of the Northwest Territories, as an advisory commission on the development of government in the Northwest Territories "to advise the Minister of Northern Affairs and National Resources on matters related to the political development of those Territories".<sup>74</sup>

The report of the Carrothers Commission, produced after hearings throughout the Territories and in Ottawa, and after consultation with specialists in a number of relevant disciplines, represents the most comprehensive examination of government in the Northwest Territories to date and has served as the guideline for political development in the Territories since its publication in August, 1966.

Without attempting a detailed review of the Commission's findings, the recommendations made by it should be examined and the extent to which they have been implemented determined. Any suggestions for changes in government structures will be predicated on certain value judgments and accepted principles. The Carrothers Commission has stated the six postulates on which it based its suggestions for the future:

1. Every citizen of Canada has a claim to participate in the institutions of responsible government under the Canadian constitution; it is a goal of political development of the Northwest Territories that the

---

<sup>74</sup>Order in Council 1005, 1965.

optimum number of Canadian citizens resident in the Territories should, at an optimum speed, participate in government as fully as Canadian citizens resident in the provinces.

2. The competence of political institutions should be commensurate with the dimensions of the social and economic problems in the political unit.
3. The structure and technique of government should not be foreign to the Canadian political tradition.
4. Every resident of the Northwest Territories for whom freedom of movement within and without the Territories is not a realistic fact has a claim to economic opportunity that will provide a standard of living that does not deviate substantially from the Canadian norm.
5. So long as the Northwest Territories remains a political unit or units separate from the provinces, the federal government has a major, although not necessarily an exclusive, responsibility for its economic development.
6. The Eskimos and Indians, as indigenous minorities, should be free to maintain their cultural and ethnic identities, subject to fundamental human rights as recognized by the Canadian constitution.<sup>75</sup>

The recommendations of the Commission were made for a decade, it being their opinion that the uniqueness of the region, the unpredictability of its future and the dangers inherent in any irreversable change made it unwise to plan for any longer period.<sup>76</sup> That decade has now expired and it will be seen from what follows that most of the recommendations have been implemented.

Of most immediate interest to the residents of the Territories were the issues of division of the Northwest Territories and the location of the seat of government. The Commission recommended against creation of

---

<sup>75</sup>Carrothers Commission Report, op. cit., fn. 70, at pp. 125-139.

<sup>76</sup>Ibid, at pp. 140-1.



two or more separate political units or the annexation of any territory to existing provinces on the basis of the possible detriment to Inuit of the less developed eastern arctic and the Indian minority of the west, and because division was not necessary in order to promote political development short of provincial status. The choice of Yellowknife as the capital of the Territories was accepted.

Provincial status for the Northwest Territories was rejected for a number of reasons: It was inconceivable that the Federal Government would transfer sub-surface rights to a government representing less than .02 percent of the Canadian population, three-fifths of whom were politically unsophisticated and economically depressed indigenous people; A western arctic province would have a white majority and thus a white government with the possible gerrymandering of the indigenous inhabitants out of effective participation in government; There was no sufficient tax base; The human resource base of education and experience was insufficient for the effective functioning of local government.<sup>77</sup>

The remainder of the Commission's recommendations concern the structure of the Territorial Government and the mechanisms to encourage economic growth. Implicit in the recommendations is the proposition that while the Territories were not yet ready to become a province, the direction of development should be towards greater representation, the growth of local responsibility and, ultimately, political structures analogous to those in the provinces.

---

<sup>77</sup>Ibid, at pp. 148-9.

The first steps were taken while the Commission was sitting, with the expansion of the Council to twelve members, including seven elected representatives from ridings encompassing the whole of the Northwest Territories.<sup>78</sup> This amendment to the Northwest Territories Act also gave the Commissioner in Council control over the qualifications of its electors and candidates and made important changes in the fiscal arrangement of the Territories. There would now be a separate Consolidated Revenue Fund of the Northwest Territories to be appropriated by the Commissioner in Council for Territorial purposes subject to the traditional restrictions that money bills must first be recommended to the legislature by the executive, and subject to any specific purposes designated by Parliament in passing the federal grant. All of these changes were included in the Commission's recommendations.

The Commission recommended retaining the office of Commissioner and the nomenclature used in respect of this office and other Territorial bodies,<sup>79</sup> giving him the status of a Deputy Minister and making his salary a first charge on the Consolidated Revenue Fund of the Northwest Territories. He was to continue to preside over Council sessions and have the power to reserve bills and dissolve the Council. Eventually it

---

<sup>78</sup>Stats. Can. 1966-67, c. 22, s. 1; Electoral Districts Ordinance O.N.W.T. 1965 (2nd sess.), c. 4; Commissioner's Order 122-66.

<sup>79</sup>With the exception of the Council, which it suggested be called the Legislative Assembly. This change has not been made in the Northwest Territories Act, but by resolution of the Council of February 13, 1976 (Debates, Northwest Territories Council, 58th sess., p. 910-13) the use of the titles Legislative Assembly, Member of the Legislative Assembly, and Minister have been adopted.

saw this office evolving into that of a Lieutenant Governor. The expanded role of the Commissioner is discussed in the next chapter. He did remain as a member of the Council until it became fully elected in 1975<sup>80</sup> and has now the status of a Deputy Minister, but cannot dissolve the Council<sup>81</sup> or reserve bills for the pleasure of the Governor in Council on his own motion.

If the recommendations of the Commission regarding the office of the Commissioner have not generally been accepted, then even less so have those in relation to the Deputy Commissioner. In relation to this office the Commission saw an eventual evolution to Premier, and recommended that he be appointed by the Commissioner, eventually from the elected members of the Council, and that he be capable of receiving powers delegated by the Commissioner. None of these recommendations have been accepted. The Deputy Commissioner need no longer be a member of the Council, and is not one at the present time.<sup>82</sup>

The third major set of recommendations made in relation to the executive branch was to establish an Executive Council presided over and chosen by the Commissioner, with each member responsible for a department of government and being, eventually, chosen entirely from the elected members of the Council. This was to be the prelude to responsible cabinet government.

No legislative sanction has been given to such an arrangement, but

---

<sup>80</sup>Stats. Can. 1974, c. 5, s. 10.

<sup>81</sup>The Governor in Council is now obliged to consult with members of the Council before dissolution. Ibid, s. 10.

<sup>82</sup>Stats. Can. 1974, c. 5, s. 8.

there is now an Executive Committee of the Territorial Government composed of the Commissioner, Deputy Commissioner, an Assistant Commissioner and three elected members of the Council. These latter three members are members of the public service of the Northwest Territories each having responsibility for a department of the government: presently, education, social development, and economic development. The elected members have all been recommended for appointment by the Council, and presumably enjoy the confidence of that body, but there is no requirement that the Commissioner accept their advice or act upon it.

Hand in hand with the recommendations of the Carrothers Commission regarding executive officers were its major recommendations for the transfer to the Territorial Government of the responsibility of providing provincial-type services through a Territorial civil service organized into departments of economic development, local government, education, welfare and social services, public works, justice and land and resources. It is in this area that the most dramatic and obvious changes have taken place over the past decade. From a civil service of approximately fifty, and operating and capital budgets of \$9,640,400 and \$4,746,383 respectively in 1965-66,<sup>83</sup> the government began a massive increase, commencing with the move from Ottawa to Yellowknife in 1967. It now has almost three thousand civil servants<sup>84</sup> in eleven

---

<sup>83</sup>Carrothers Commission Report, op. cit. fn. 69, p. 49.

<sup>84</sup>Debates, Northwest Territories Council, 58th sess., February 12, 1976, p. 844. At this time there were approximately 2,700 members of the Territorial public service with another 400 positions vacant. This includes approximately 900 school personnel who would normally be employed by local school boards.

departments,<sup>85</sup> spending an appropriation in 1976-77 of \$157,666,300 for operations and \$43,629,000 for capital expenditures.<sup>86</sup>

The Territorial Government is now responsible for and administers most of those government programs and services that would be provided by a provincial government and, in addition, as recommended by the Commission, provides such services to Indians and Inuit on behalf of the Department of Indian Affairs and Northern Development. Most of this transfer of responsibility was possible under legislation existing at the time of the Carrothers Commission, but for certain purposes there was required an extension of the legislative powers of the Commissioner in Council. In line with the recommendation that the Council have legislative authority over all areas of provincial responsibility other than amendment of the Constitution of the Territories, financial matters except as existing in 1966, subsurface land rights and some aspects of the administration of justice, the powers of the Council have been increased to include the constitution of civil and criminal courts and the establishment and maintenance of territorial prisons.<sup>87</sup> In addition, lands around

---

<sup>85</sup> Annual Report of the Government of the Northwest Territories, 1976, p. 34. These departments are: national and cultural affairs, public works, planning and program evaluation, local government, education, social development, economic development and tourism, finance, personnel, public services (including administrative functions of an Attorney-General's department), and information. A number of bodies fall outside the ambit of any department, including the security advisor, native claims liason, regional directors, the Northwest Territories Housing Corporation, Clerk of the Council, Ottawa liason, Edmonton liason, and emergency planning and environment protection.

<sup>86</sup> Appropriation Ordinance, 1976-77, O.N.W.T. 1976, 1st sess., c. 13. These figure do not include any supplementary supply bills.

<sup>87</sup> Stats. Can. 1969-70, c. 69, s. 17, amended by Stats. Can. 1974, c. 5, s. 14.

settlements have been transferred to the Commissioner as recommended. The Federal Government has retained, however, the areas of labour relations, the prosecution of criminal offenses and, to some extent, health and welfare.<sup>88</sup>

With regard to the Council itself, the recommendations of the Commission, except that concerning its name, have all been accepted and, in some cases, exceeded. The Commission recommended an increase in the number of elected members and in their term of office. In 1966 the Council was increased to twelve members with seven elected;<sup>89</sup> to fourteen members with nine elected in 1970<sup>90</sup> and, finally in 1975, to fifteen elected members choosing a speaker and establishing their own indemnities and allowances.<sup>91</sup> The term of office has been increased from three years to a maximum of four years,<sup>92</sup> rather than five as suggested by the Commission. The time for disallowance of ordinances has been reduced from two years to one,<sup>93</sup> the same as for provincial statutes.<sup>94</sup>

The result of the Commission's recommendations and their implementation has been a dramatic increase in the size, activity and responsibility of the Government of the Northwest Territories, and in its impact on the lives of the people of the Territories. In the space of a decade it has been transformed from a small organization operating primarily in Ottawa

---

<sup>88</sup> A detailed discussion of the powers of the Commissioner in Council is contained in the next chapter.

<sup>89</sup> Stats. Can. 1966-67, c. 22.

<sup>90</sup> Stats. Can. 1969-70, c. 69.

<sup>91</sup> Stats. Can. 1974, c. 5.

<sup>92</sup> Stats. Can. 1969-70, c. 69, s. 14.

<sup>93</sup> Ibid, s. 18.

<sup>94</sup> British North America Act, 1867, s. 90.

and indistinguishable from the Federal Government to a full scale resident government with a representative legislature and a public service administering almost all of the normal provincial-type programs and services.

The final recommendation of the Carrothers Commission was that its work be reviewed after ten years. During the first Council session of 1977 the Council requested just such a review to be conducted under its auspices.<sup>95</sup> The legislation which would have permitted such a review did not receive the necessary recommendation from the Commissioner, but negotiations with the Minister of Indian Affairs and Northern Development led to a promise by him of an internal review and the presentation to him of proposals by the Council for future political developments.<sup>96</sup> The Federal Government has now appointed Charles M. Drury as its special representative for Constitutional Development in the Northwest Territories to consult with local residents and examine the alternatives for constitutional development so that decisions concerning these matters may be taken by the Federal Government as soon as possible.<sup>97</sup>

---

<sup>95</sup> Report of the Committee on Constitutional Development of the Northwest Territories, Legislative Assembly tabled document 9-61, adopted February 11, 1977.

<sup>96</sup> The Legislative Assembly submitted its position to the Minister in a paper entitled Priorities For the North, July 1, 1977.

<sup>97</sup> The terms of reference and the policy statement which accompanied them entitled Political Development in the Northwest Territories (Ottawa, July 19, 1977) will be discussed at greater length in subsequent chapters.

## CHAPTER TWO

### THE NATURE OF THE NORTHWEST TERRITORIES AS A POLITICAL UNIT AND ITS PLACE WITHIN CONFEDERATION

The purpose of this chapter is to examine the nature of the Northwest Territories as a political unit and to examine the place of the Territories within the Canadian Federation or, in other words, to examine the relationship of the Northwest Territories to the rest of Canada. This examination is necessitated by the prevailing confusion concerning the nature of territorial government, a confusion which manifests itself in the use of such terminology as "colony" in relation to the Northwest Territories, and in such problems as whether the Commissioner of the Northwest Territories must be impleaded in the Federal Court,<sup>1</sup> and whether the City of Yellowknife is a federal work or undertaking for purposes of the Canada Labour Code.<sup>2</sup>

Such an examination requires at least a working definition of the concept of "Government". To avoid the difficulties inherent in any attempt to arrive at a comprehensive theory or definition of government, the technique which will be used in this chapter will be to posit government as it exists in Canada, at the federal and provincial levels, as the models of government against which the political structures and institutions of the Northwest Territories will be compared. This method will, it is hoped, provide a clearer understanding of the nature of Territorial structures and

---

<sup>1</sup>See, for example, Re Simonson and Hodgson, (1975), 63 D.L.R. (3d) 560 (S.C.N.W.T.).

<sup>2</sup>City of Yellowknife v. Public Service Alliance of Canada, (1975), 63 D.L.R. (3d) 753 (F.C.A.).



institutions than can be obtained by reference to any abstract notions of government. At the same time, it will lead to an assessment of the relationship of the Northwest Territories to the rest of Canada, and particularly to the Federal Government as representative of the Canadian state as a whole.

When discussing an entity such as the Northwest Territories it is not enough to merely examine the internal structure and functioning of its political institutions. They must be seen in relation to other governmental institutions which claim to exercise governing powers in the same territorial area, or which claim to have some overriding and superior governing power. This chapter is a discussion of the law of the constitution of the Northwest Territories in both those aspects, internal and external.

The second prerequisite to the discussion is a description of what is encompassed by the words "law of the constitution". Again, there are immense difficulties in giving any comprehensive theory or definition of constitutional law or, indeed, of law or constitution as separate concepts.

Rather than attempting to set down a definition which will satisfy lawyers, philosophers and political scientists, the discussion in this chapter will focus on three of the elements which make up a constitution and which are, at the same time, sources which lawyers and judges examine to determine what the law of the constitution is. The first element is what has been called the written constitution: those documents recognized as having force of law which establish political institutions or which define their powers and their relations to other political institutions. The second element is the judicial interpretation and application of those

documents. This includes, to some extent, a prediction of how the courts would interpret and apply the constitutional documents and previous judicial decisions if faced with particular questions. The third element consists of what may be called "constitutional facts". This involves an assessment of the actual functioning of the political institutions and their relationship to other political institutions. This third element requires a recognition that the law, at least in constitutional matters, consists of what is as well as what ought to be. The acceptance of this proposition is necessary to this examination if, as will become clear, a constitution can evolve and develop with no major changes in the relevant constitutional documents. This is nothing more than the acceptance of constitutional convention as a part of the blend of factors which make up constitutional law.

Having made these observations concerning the method of enquiry, it is now possible to begin to look at the constitutional nature of the Northwest Territories.

A. The Legislative Assembly of the Northwest Territories as a Legislative Body

The central feature of government as it is understood in this country is the concept of "parliamentary democracy". The first part of this paper will look at the Council of the Northwest Territories to determine its status as a legislature as that term is understood in reference to the Federal Parliament and Provincial Legislatures or Legislative Assemblies. The Council established by the Northwest Territories Act<sup>3</sup> and referred to

---

<sup>3</sup>R.S.C. 1970, c. N-22, amend. Stat. Can. 1974, c. 5, s. 10.

in that Act as the "Council" or the "Council of the Territories" will hereafter be called the "Legislative Assembly of the Northwest Territories" or simply the "Assembly". This change in nomenclature may beg the question, but is made in deference to the Assembly's wishes.<sup>4</sup> The Assembly now refers to itself as such and the usage is becoming accepted in Territorial newspapers. A more compelling reason for the change is that it is consistent with the conclusions reached in this chapter.

In order to simplify this portion of the discussion, it will be convenient to view it as a search for an answer to the following question: Is the Assembly a legislative body analogous to the Federal Parliament or a provincial legislature, or is it merely a creature of the Federal Parliament, exercising powers as a delegate of Parliament and therefore analogous to such federal agencies as the Canadian Transport Commission or the Canadian Egg Marketing Agency?

#### 1. The Juridical Nature of the Assembly

The question posed above is, has the Assembly received a grant of legislative power from the Federal Parliament in the Northwest Territories Act, or is it a mere delegate. This is a question which may be asked of any body created by legislation and given the power to make laws.

The concept of a grant of legislative power arose in connection with British colonial law and was developed and refined by the Judicial Committee of the Privy Council in that context. It R. v. Burah<sup>5</sup> the issue was

---

<sup>4</sup>N.W.T. Council Deb., 58 Sess., February 13, 1976, pp. 910-913.

<sup>5</sup>(1878), 3 App. Cas. 889.

whether the Governor-General in Council of British India could delegate to the Lieutenant-Governor of Bengal the power to determine when and where a certain piece of legislation would come into force. The High Court at Bengal applied the principle delegatus non potest delegare to the Governor-General in Council. In reversing that judgment Lord Selborne, for the Privy Council, observed:

But their Lordships are of the opinion that the doctrine of the majority of the Court is erroneous, and that it rests upon a mistaken view of the powers of the Indian Legislature, and indeed the nature and principles of legislation. The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But, when acting within those limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself.<sup>6</sup>

The distinction between this type of grant of legislative power and a delegation of power was drawn by Sir Barnes Peacock in Hodge v. The Queen,<sup>7</sup> a decision dealing, in part, with the ability of the Ontario Legislature to delegate regulation-making authority to a Provincial Minister. There the Privy Council said that by the British North America Act, 1867, the Imperial Parliament had

conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances [to delegate powers].<sup>8</sup>

---

<sup>6</sup>Ibid, at p. 904.

<sup>7</sup>(1883), 9 App. Cas. 117 (P.C.).

<sup>8</sup>Ibid, at p. 132.

These principles were applied to colonial legislatures generally in Powell v. Appollo Candle Company Ltd., where, in relation to New South Wales, the Privy Council applied Burah and Hodge, saying, "these two cases put an end to a doctrine which appears at one time to have had some currency, that a Colonial Legislature is a delegate of the Imperial Legislature."<sup>9</sup>

Whether the Legislative Assembly of the Northwest Territories is a legislature in the same sense as these colonial legislative bodies or legislatures has never been clearly decided by the courts. There are, however, a number of decisions of the Supreme Court of Canada and lower courts which either deal specifically with the nature of Territorial legislation or which indicate possible approaches to the problem. In dealing with this issue three questions present themselves: whether Parliament could create such a legislature; whether it intended to do so; and, whether it in fact has done so. None of the cases which follow deal specifically with all of these questions, but an analysis of them and the relevant legislation will indicate the solution.

The Judicial Committee in Burah said: "Their Lordships agree that the Governor-General in Council could not, by any form of enactment, create in India, and arm with general legislative authority, a new legislative power, not created or authorized by the Councils Act".<sup>10</sup>

The British North America Act, 1867 said nothing of the form of government for the Northwest Territories other than the provision in Section 146 that the admission of the Northwestern Territory and Rupert's Land was to be "subject to the provisions of this Act." The Rupert's Land Act, 1868,

---

<sup>9</sup>(1885), 3 App. Cas. 889.

<sup>10</sup>R. v. Burah (1878), 3 App. Cas. 889, at 905.

provided that upon the admission of Rupert's Land to Canada ". . . it shall be lawful for the Parliament of Canada from the date aforesaid to make, ordain, and establish within the Land and Territory so admitted as aforesaid all such Laws, Institutions, and Ordinances, and to constitute such Courts and Officers as may be necessary for the Peace, Order, and good Government of Her Majesty's Subjects and others therein".<sup>11</sup>

The First joint Address of the Senate and House of Commons to the Queen<sup>12</sup> recited that the inhabitants of the area "would be materially enhanced by the formation therein of political institutions bearing analogy, as far as circumstances will admit, to those which exist in the several provinces of this Dominion."

Further, the British North America Act, 1871, confirmed that the Canadian Parliament could create provinces out of the Northwestern Territory and Rupert's Land and make provision for their constitutions, and could "from time to time make provision for the administration, peace, order, and good government of any territory not for the time being included in any province."<sup>14</sup> It also ratified the Temporary Government of Rupert's Land Act,<sup>15</sup> which contained provision for the appointment by the Governor-in-Council of a Lieutenant-Governor and Advisory Council for the Northwest Territories.

Against this background the Supreme Court of Canada considered the

---

<sup>11</sup> 32-33 Vict., c. 3, s. 5 (Imp.), R.S.C. 1970, App. II, no. 6.

<sup>12</sup> Order in Council admitting Rupert's Land and the North-Western Territory into the Union; 23rd day of June, 1870, App. "A"; R.S.C. 1970, App. II, no. 9, Schedule A.

<sup>13</sup> 34-35 Vict., c. 28 (U.K.); R.S.C. 1970, App. II, no. 11.

<sup>14</sup> Ibid, s. 4.

<sup>15</sup> 32-33 Vict., c. 6 (Can., 1869); R.S.C. 1970, App. II, no. 7.

status of Territorial legislation in The Rural Municipality of North Cypress v. Canadian Pacific Railway.<sup>16</sup> The question relating to the Northwest Territories was whether a tax imposed by a school district in the Northwest Territories, authorized by a Territorial Ordinance, was "taxation by the Dominion" within the meaning of clause 16 of an agreement between the Federal Government and the Canadian Pacific Railway which had been specifically authorized by an Act of Parliament.<sup>17</sup> The effect of clause 16 was to exempt forever the property of the C.P.R. used in its operations from "taxation by the Dominion or by any Province hereafter to be established or by any municipal corporation therein".

Killam C.J., speaking for the majority of the Manitoba Court of Appeal,<sup>18</sup> with some hesitation, came to the conclusion that Territorial legislation was not Dominion legislation. He rejected the argument that the Legislative Assembly was a mere delegate of the Federal Government, saying:

It does not seem to me that the Government of the Territories could be properly described as a delegate or branch of the Dominion Government, or taxation by its authority, within its then powers, as taxation by the Dominion. Its position appears to be approximately described by the language of Lord Selbourne, with reference to India, in The Queen v. Burah.<sup>19</sup>

This view was rejected by four of the five Justices of the Supreme Court of Canada who considered it. Davies J., speaking for himself, and

---

<sup>16</sup> (1904), 35 S.C.R. 550.

<sup>17</sup> An Act respecting the Candian Pacific Railway, Stats. Can. 1881, c. 1.

<sup>18</sup> (1903), 14 Man. L.R. 382.

<sup>19</sup> Ibid, at 409.

Sedgewick J. said:

I am unable for myself to reach the conclusion that the principles with regard to legislation generally and specially with regard to India laid down in the Burah case have, or can have any application to the special tentative and uncertain powers of legislation which were vested in the Lieutenant Governor in Council or the Lieutenant Governor by and with the advice of the Assembly for the Northwest Territories in 1881.<sup>20</sup>

. . . . .

I am of the opinion that the powers of legislation of the Northwest Territories Council were delegated powers from the Dominion . . . .<sup>21</sup>

This difference is based upon a difference in approach which had been foreseen by Killam C.J.:

The questions whether, by the contract and the ratifying Act, the authority of the Governor General to extend the legislative powers of the Northwest Council was restricted, and whether the subsequent statutes and orders in council should be interpreted with the limitations accepted by the Dominion upon its powers of taxation, either by virtue of the restrictions against enactments inconsistent with Acts referring to the Territories or under the maxim - Generalia specialibus non derogant - should be kept entirely separate from the question of the construction of the contract.<sup>22</sup>

To put it more plainly, Killam C.J., chose to look first for the constitutional position of the N.W.T., and then to interpret the contract with the C.P.R. in light of his conclusion on the constitutional question.

---

<sup>20</sup> (1904), 35 S.C.R. 550, at 570.

<sup>21</sup> Ibid, p. 573-4.

<sup>22</sup> Op. Cit., (1903), 14 Man. L.R. 382, at 407.



Davies J., on the other hand, discovers the constitutional position by an analysis of the circumstances at the time of the making of the contract; a reversal of Killam's method. His reasoning demonstrates this approach:

Look at the condition of matters as it was in the Territories in 1881, when the contract was ratified and approved by Parliament. It is conceded that at that time there was no municipal corporation or school district in any part of them; that there was no Dominion statute imposing any taxation and no ordinance of the territories imposing any.

. . . . .  
It was in these conditions and circumstances that the contract was passed with the exemption from taxation clause I am considering, and the question is: <sup>23</sup>What meaning is to be attributed to its language?

Just as Killam looked at the reality of Territorial Government as it existed in 1903, Davies considered it as it had been in 1881, when the contract with the C.P.R. was entered into. Where Killam saw a territory with a rapidly expanding population having a representative and responsible government on the verge of obtaining provincial status, Davies saw an unsettled tract with a legislature appointed in Ottawa and a rudimentary executive branch responsible only to Ottawa.

Davies spoke for only two members of the Court and his remarks may be read as dicta because he also rests his opinion on the fact that the Dominion Government retained an over riding legislative authority over the Northwest Territories and had exercised that authority in passing

---

<sup>23</sup> Op. Cit., 35 S.C.R. 550 at 573.

the Act ratifying the contract. Nesbitt J. and Girouard J., in separate judgments, each relied on the provision of the Northwest Territories Act prohibiting Territorial legislation inconsistent with any Act of Parliament.<sup>24</sup>

The Supreme Court of Canada dealt with the relationship between Federal and Territorial legislation again in R. v. Drybones,<sup>25</sup> although in that case it did not comment extensively on the nature of the Assembly or the powers exercised by it. The central issue in Drybones was whether a section of the Indian Act,<sup>26</sup> creating the offense of being intoxicated off a reserve was in conflict with the Canadian Bill of Rights<sup>27</sup> by treating Indians more harshly than non-Indians. The Crown in that case had argued that the inequality in treatment arose in part because of the offences created and penalties provided by the Liquor Ordinance of the Northwest Territories. The identical issue had been faced in R. v. Gonzales<sup>29</sup> where the same provisions in the Indian Act and the Bill of Rights had arisen in conjunction with British Columbia liquor legislation, but the British Columbia Court of Appeal had not found it necessary to consider the fact that the inequality arose to some extent because of the provincial legislation. Ritchie J. for the majority of the Supreme Court in Drybones, dealt with the problem by simply saying that, "the ordinance in question is a law of Canada

---

<sup>24</sup> Ibid, p. 559 and p. 580. Chief Justice Taschereau dismissed the action in respect of the N.W.T. School District on the grounds that the Manitoba Courts had had no jurisdiction to entertain it.

<sup>25</sup> [1970] S.C.R. 282.

<sup>26</sup> R.S.C. 1970, c. I-6.

<sup>27</sup> R.S.C. 1970, App. III; Stats. Can. 1960, c. 44, amended 1970-71-72, c. 38, s. 29.

<sup>28</sup> R.O.N.W.T. 1974, c. L-7.

<sup>29</sup> (1962), 37 C.R. 56; 37 W.W.R. 257; 32 D.L.R. (2d) 290; 132 CCC 237.

within the meaning of s. 5(2) of the Bill of Rights (see Northwest Territories Act, R.S.C. 1952, c. 331, s. 15)."<sup>30</sup> That statement is unsupported in Ritchie's judgment by any reasoning or analyses.

Ritchie's judgment does not depend for its conclusion on this finding, which may, therefore, be treated as dicta. He summarizes his conclusion as follows:

. . . I think that s. 1(b) [of the Bill of Rights] means at least that no individual or group of individuals is to be treated more harshly than another under [the law of Canada] and I am therefore of the opinion that an individual is denied equality before the law if it is made an offense punishable at law, on account of his race, for him to do something that his fellow Canadians are free to do without having committed any offense or having been made subject to any penalty.<sup>31</sup>

The proposition that Territorial Ordinances are laws of Canada within the meaning of the Bill of Rights was repeated by Ritchie in A.G. Can. and Rees v. Canard<sup>32</sup> and used to distinguish Drybones from Canard. It was also repeated by Beetz J., in that case, but with a clear indication that the effect would be the same if Federal legislation was construed in juxtaposition with Provincial legislation. Laskin, C.J.C., dissenting, was also of the view that the status of the local legislation was irrelevant

---

<sup>30</sup> Op. Cit., f.n. 25, at 291. Section 17(1) referred to by Ritchie (now Section 18(1)) reads as follows: "Subject to this Act, the laws of England relating to Civil and Criminal matters, as such laws existed on the 15th day of July, 1870 are in force in the Territories, insofar as they are applicable to the Territories and insofar as they have not been or are not hereafter repealed, altered, varied, modified or affected in respect of the Territories by any Act of the Parliament of the United Kingdom or of the Parliament of Canada or by any Ordinance."

Section 5(2) of the Bill of Rights reads as follows:

"The expression, "Law of Canada" in part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada."

<sup>31</sup> Op. Cit., f.n. 25, at 297.

to the Drybones decision, saying:

I cannot believe that the Drybones case would have been decided differently if s. 94(b) of the Indian Act stood alone, thus making Indians alone subject to liability and penalty for being intoxicated off a reserve, but there was no prohibition against anyone else. The Territories liquor ordinance merely circumscribed the offense and the issue of inequality resided in the want of any prohibition outside of that circumscription affecting others than Indians.<sup>33</sup>

The debate contained in the Bill of Rights cases over the necessity of including Territorial legislation within "the law of Canada" is likely to continue in view of its importance in the application of the Bill of Rights. Rather than enter that debate and rely upon a conclusion which will doubtless be hotly disputed,<sup>34</sup> it will be of greater value to look at the effect of accepting Ritchie's position in its entirety. The extreme analysis of that position is that Territorial ordinances have no greater status than statutory orders or regulations. The Bill of Rights does not, however, require that interpretation, and neither does anything contained in the judgments concerning it. The Act includes as a "law of Canada" any law "in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada."<sup>35</sup> To say that enactments of the Territorial

---

<sup>32</sup> [1975] 3 W.W.R. 1, 16.

<sup>33</sup> Ibid at 33 et. seq.

<sup>34</sup> In addition to the comments of the learned Justices, including Pigeon J., in Drybones at p. 303, see: R. Michael M'Gonigle, the Bill of Rights and the Indian Act: Either/Or? (1977), 15 Alta. L. Rev. 292; Tarnapolsky, W., the Canadian Bill of Rights from Diefenbaker to Drybones (1971), 17 McGill L.J. 422; Hogg, P.W., the Canadian Bill of Rights - "Equality Before the Law" (1974), 52 Can. Bar Rev. 263; Katz, The Indian Act and Equality Before the Law (1973), 6 Ottawa L. Rev. 277.

<sup>35</sup> Op. Cit., f.n. 27. Emphasis added.

Assembly come squarely within that definition does not necessarily, or even reasonably, indicate that they are "federal laws", but is no more than a recognition of the overriding Federal legislative authority over the Territories, an authority which is clearly not obsolete in the same way that the power of the Imperial Parliament to legislate for Canada or any of the Provinces is obsolete.<sup>36</sup> Parliament is capable of legislating for the Territories in any manner which it sees fit, particularly where there is a legislative void in the Territories,<sup>37</sup> and appears to have done so in the case of the Bill of Rights. The existence and exercise of such an overriding legislative power does not necessarily reduce the government of the Northwest Territories to the level of a federal agency, or remove from it the qualities of a separate government that were attributed to India in Burah, or Ontario in Hodge.

Thus far the cases in relation to the Northwest Territories have dealt with the problems of conflict between Federal and Territorial legislation or the application of federal legislation to the Northwest Territories as local, as opposed to national, legislation. In these instances the answers are clear and consistent; no fetters are imposed on the power of Parliament to legislate in regard to the Northwest Territories, and in case of conflict between Federal and Territorial legislation, Federal will

---

<sup>36</sup> The Imperial Parliament no longer has legislative authority over Canada save (in theory) in respect of British North American Acts. Statute of Westminster, R.S.C. 1970, App. II, no. 26.

<sup>37</sup> Public Service Alliance of Canada v. City of Yellowknife, (1977), 14 N.R. 72 (S.C.C.). Laskin C.J.C., in separate reasons concurring with the majority in result, stresses the lack of collective bargaining legislation in the Northwest Territories as a factor in applying the Canada Labour Code provisions to a municipality in the N.W.T.

prevail, whether it would have been ultra vires if in relation to a province or not.<sup>38</sup> The answer to the question whether, through subordinate, the legislation of the Commissioner-in-Council is of the same nature as provincial legislation must be sought, for the most part, in the reasoning of lower courts.

One comment has been made in the Supreme Court which is worth repeating more because of the manner in which it states the question than because of its status as an authoritative statement. The comment comes from Duff J., as he then was, in Re Gray,<sup>39</sup> in which the Court considered the extent of the power of the Dominion Parliament to delegate its legislative authority. At issue was the extent of the delegation of power to the Governor-in-Council under The War Measures Act<sup>40</sup> to make orders and regulations "for the security, defense, order and welfare of Canada",<sup>41</sup> which Duff J. contrasted with the Northwest Territories Act as follows:

Our own Canadian constitutional history affords a striking instance of the "delegation" so called of legislative authority with which the devolution effected by The War Measures Act, 1914, may usefully be contrasted. The North-West Territories were, for many years, governed by a council exercising powers of legislation almost equal in extent to those enjoyed by the provinces.

The statute by which this was authorized, by which the machinery of responsible government, and what in

---

<sup>38</sup> Lasking, C.J.C., in Public Service Alliance of Canada v. City of Yellowknife, *ibid.*, comments as follows: "In view of the all encompassing legislative authority of the Parliament of Canada in the Northwest Territories, I do not think there is any justification for assessing the scope of Part V of the Labour Code, in its application to the Northwest Territories, in exactly the same way in which the respective limits of Federal and Provincial legislative jurisdiction in relation to labour relations would be measured."

<sup>39</sup> [1918] 3 W.W.R. 111; 57 S.C.R. 150.

<sup>40</sup> Stat. Can. 1914 (2nd Ses.), c. 2.

<sup>41</sup> *Ibid*, 6.

substance was parliamentary government was set up and maintained in that part of Canadian territory, was passed by the Parliament of Canada and it was never doubted that this legislation was valid and effectual for these purposes under the authority conferred upon Parliament by the Imperial Act of 1871 "to make provision for the administration, peace, order, and good government in any territory not for the time being included in any province."

That, of course, involved a degree of devolution far beyond anything attempted by The War Measures Act, 1914. In the former case, while the legal authority remained unimpaired in Parliament to legislate regarding the subjects over which jurisdiction had been granted, it was not intended that it should continue to be, and in fact it never was, exercised in the ordinary course; and the powers were conferred upon an elected body over which Parliament was not intended to have and never attempted to exercise, any sort of direct control. It was in a word strictly a grant (within limits) of local self-government.<sup>42</sup>

These comments are clearly dicta, but constitute the most comprehensive expression of an opinion on the nature of the Northwest Territories to come out of the Supreme Court. It is interesting to note that Duff, in 1918, looks to the situation as it existed prior to 1905,<sup>43</sup> whereas Davies, J., in North Cypress looked at the situation in the Territories as it had existed in 1881.

Duff's comments were repeated in R. v. Lynn Holdings Limited,<sup>44</sup> a case dealing with the power of the Commissioner in Council of the Yukon Territory to delegate legislative power to municipalities in the Territory. The Magistrate dismissed the argument that the principle delegatus non

---

<sup>42</sup> Op. Cit., f.n. 39, W.W.R. at 123.

<sup>43</sup> This conclusion is based on Duff's comments and the fact that at the time he wrote there was no Territorial Council or Civil Service to speak of.

<sup>44</sup> (1969), 68 W.W.R. 64 (Yukon Territory Magistrates Court).

potest delegare applied to the Yukon Legislature on the basis of the Appollo Candle case finding that:

It would appear the primary purpose of the Yukon Act is to establish in the Yukon Territory a form of limited self-government, similar in scope to the power and authority of the Provinces . . . In granting powers similar to those in the Provinces, it is apparent Parliament intended that the Yukon legislative body should have legislative power in certain limited designated fields.<sup>45</sup>

This decision was commented upon favorably by Morrow, J.A., sitting as a member of the Yukon Court of Appeal in R. v. Chamberlist.<sup>46</sup>

Accepting as he does the ability of the Council to delegate powers to municipalities,<sup>47</sup> Morrow raises the important question of the rationale for admitting such a power. The passage in which the question is posed is somewhat confusing, but basically may be said to contain the following proposition. The authority of a province to delegate legislative power derives from the nature of the grant of legislative authority to the provinces as defined in the Burrah, Hodge and Appollo Canadle cases. There is no doubt that the Federal Parliament may delegate power to the Yukon Legislature which, in turn, may delegate those powers because the Yukon Council is: (a) endowed with an original, self responsible and exclusive jurisdiction to enact laws and has, therefore, an inherent power as a legislature to delegate, or (b) it is a subordinate agency of

---

<sup>45</sup> Ibid, at p. 67.

<sup>46</sup> (1970), 72 W.W.R. 746, at 753.

<sup>47</sup> He relies in part on Dinner v. Humberstone (1896), 26 S.C.R. 252, in which the Supreme Court accepted a delegation of power to the City of Edmonton without comment.



Parliament entrusted with the exercise of legislative action by a delegation of power from Parliament which has not been exhausted within the agency itself, but which may in turn be sub-delegated.

Morrow finds this distinction in the words of Rand J. writing in the Nova Scotia Interdelegation case<sup>48</sup> where, in relation to the ability of the Federal Parliament to delegate its legislative authority to a provincial legislature, he states:

The essential quality of legislation enacted by these bodies is that it is deemed to be law of the legislatures of Canada as a self-governing political organization and not law of the Imperial Parliament. It was law within the Empire and was law within the Commonwealth; but it is not law as if enacted at Westminster, though its source of authority is derived from that Parliament.

The distinction between the status of such a legislature and a delegate arises from the difference between an endowment by a paramount legislature of an original, self-responsible and exclusive jurisdiction to enact laws, subject, it may be, to restrictions and limitations, and the entrustment of the exercise of legislative action to an agency of the entrusting authority. The latter is a present continuing authority to effect provisions of law which are attributed to the delegating power. The difference between these conceptions is of substance, a difference lying in the scope and nature of the powers conferred and retained.<sup>49</sup>

He goes on to cite R. v. Burah in support of this proposition and points out that there are "certain conditions to the procedure of enactment such as, for example, the participation in legislation of the Sovereign

---

<sup>48</sup> A.G. of Nova Scotia v. A.G. of Canada, [1951] S.C.R. 31; [1950] 4 D.L.R. 369.

<sup>49</sup> Ibid, S.C.R., at 46.

through the Lieutenant-Governor as exemplified in Re Initiative and Referendum Act, 48 D.L.R. 18, [1919] A.C. 935, and the provisions of ss. 53 and 54 of the Act of 1867 dealing with taxation and the appropriation of the public revenue by Parliament.<sup>50</sup>

Taking his cue from that extract Morrow, J.A. phrases the question as follows:

Taking, therefore, the dominion government as the paramount legislature here, in giving the commissioner in council of the Yukon the powers enumerated in sec. 16 of the Yukon Act, which powers include the power to legislate in relation to municipal institutions (sub-sec. [c]), . . . can this be the type of delegation prohibited as between dominion and province (Atty.-Gen. of N.S. v. Atty.-Gen. of Can., Supra); or is it the type of entrustment discussed in the same case, and in particular by Rand, J. in the quotation above. The powers recited in sec. 16 of the Act above referred to are essentially the powers given exclusively to the provinces by sec. 92 of the B.N.A. Act, 1867.

Again, if the enactment of the Yukon Act is merely a delegation within the power of the dominion parliament, has it exhausted itself within the body, namely the commissioner in council, or can this body in turn, acting under the delegating statute, pass on to the municipal council of Whitehorse the power to "by by-law, make regulations with respect to" parking meters.<sup>51</sup>

Having raised the issue, however, he fails to deal with it except to the extent that he endorses the judgment in R. v. Lynn Holdings Ltd., but he does not explicitly accept the logic of that decision, referring to it only as "an excellent discussion of the Yukon Act and the Municipal Ordinance."<sup>52</sup>

The question is left, then, whether the federal Parliament does

---

<sup>50</sup> Ibid, D.L.R. at 384. Sections 53 and 54 of the B.N.A. Act require that all money and all tax Bills originate in the Commons and be first recommended to the House by message of the Governor-General in the session when the Bill is proposed. By section 90 the same provisions apply to the provinces.

<sup>51</sup> Op. Cit., f.n. 46 at 751.

<sup>52</sup> Ibid., at 753.

have the capacity to create a subordinate government and grant to it plenary legislative powers within the limits imposed on it. The answer, clearly, must be yes, and Rand's comments, notwithstanding their generality, must be taken as not having any reference to the relationship between the Federal and Territorial Governments.

Two routes lead to the conclusion that the Government of the Northwest Territories is a government in the same sense that a provincial government is a government, albeit some of the constituent characteristics differ. The first is to look at the relevant legislation and the course of dealing under that legislation; the second, indicated by Rand's comments themselves, is to look at the present circumstances and the indicia of government displayed by the Government of the Northwest Territories.

No problem existed with the capacity of the Imperial Parliament to create colonial governments in any form it saw fit, but the Privy Council in Burah was clearly not prepared to see the Empire develop as a pyramid, with colonies creating their own colonies. That the relationship to England was a direct one, even in the case of a federation, was affirmed in Hodge, A.G. of Ontario v. Mercer,<sup>53</sup> and The Liquidators of the Maritime Bank of Canada v. The Receiver-General of New Brunswick.<sup>54</sup> This relationship between the Mother Parliament and the colonies or, later, dominions and provinces, admits of a variation, however, in the case of the Northwest Territories and the three provinces created out of them.

---

<sup>53</sup> (1883), 8 App. Cas. 767.

<sup>54</sup> [1892] A.C. 437.

At one time the argument was made that section 146 of the British North America Act, 1867, which provides for the admission of the Territories to Canada, determined the form of government which would be established in those Territories.<sup>55</sup> The authority for governing the Territories rests, however, in the Ruperts Land Act, 1868,<sup>56</sup> the Order in Council admitting Rupert's Land and the Northwestern Territory to the Dominion,<sup>57</sup> and the B.N.A. Act, 1871.<sup>58</sup> The latter, particularly, confirmed the capacity of the Dominion Parliament to establish institutions of government in the Territories, as it had done by the Temporary Government of Rupert's Land Act<sup>59</sup> and, more conclusively, confirmed the capacity of Parliament to create new provinces out of the Territories.

Having the power to create these two widely disparate forms of government the Federal Government assumed unto itself, no doubt correctly, the power to manage the evolution from one form to the other: from wholly appointed administrators to, by 1905, representative and responsible

---

<sup>55</sup> The tenor of this argument was that section 146 of the B.N.A. Act, 1867 which provided that Rupert's Land and the Northwestern Territory should be admitted to Canada "subject to the terms of this Act" required that they be admitted basically as a province. This has been rejected by the Supreme Court of Canada in Reference as to the Constitutional Validity of Section 17 of the Alberta Act [1927] S.C.R. 364, which held that "so far as the Territories are concerned, the powers conferred by section 146 were exhausted or spent by their admission into the Union under the Order in Council of 23 of July, 1870" (at page 371). This position was adopted by the Privy Council in A.G. of Saskatchewan v. C.P.R. [1953] A.C. 594 & 614.

<sup>56</sup> 31-32 Vict. c. 105; R.S.C. 1970, App. II, no. 6.

<sup>57</sup> R.S.C. 1970, App. II, no. 12.

<sup>58</sup> 34-35 Vict.. c. 28; R.S.C. 1970, App. II, no. 11.

<sup>59</sup> 32-33 Vict., c. 3; R.S.C. 1970, App. II, no. 7.

government just short of provincial status. That evolution has been traced for the period prior to 1905 in the preceeding chapter, and the legislative changes since that time have been enumerated. It is worthwhile here to look at some of the facts surrounding the operation of the Territorial Government, focusing on its legislative powers and bearing in mind the operation of provincial government in Canada.

## 2. The Operation and Powers of the Legislative Assembly

Canvassing the facts in some detail in order to support a conclusion as to the constitutional position of the Northwest Territories is a technique with ample judicial sanction and which, in this case, has been clearly invited by the comments of our highest Courts. Perhaps the best illustration of the need for historical and political data to determine such questions is the decision of the Privy Council in Re Southern Rhodesia.<sup>60</sup> In the area of the nature of legislative powers, R. v. Burah points to the facts as determining the power of the Indian Governor in Council to delegate:

The British Statute book abounds with examples of [delegation]; and it cannot be supposed that the Imperial Parliament did not, when constituting the Indian Legislature, contemplate this kind of conditional legislation as within the scope of the legislative powers which it from time to time conferred. It certainly used no words to exclude it. Many important instances of such legislation in India are mentioned in the opinions of the Chief Justice of Bengal and of the other two learned Judges who agreed with him in this case.<sup>61</sup>

---

<sup>60</sup> [1919] A.C. 211.

<sup>61</sup> Op. Cit., f.n. 5, at 906.

Rand J. in the Nova Scotia Interdelegation case, points to features of government such as the participation of the sovereign in legislation, and the requirements that money bills be recommended by the Crown to the legislature as indicative of the stature of law making bodies.<sup>62</sup>

Looking, then, at the Assembly, a few of its characteristics will suffice to show that it has the appearance of a legislature as opposed to an administrative body. For example:

- a. The grant of powers to the Assembly in Section 13 of the Northwest Territories Act is remarkably similar to the enumeration of the powers of a province in Section 92 of the British North America Act;
- b. The Assembly is fully elected and chooses its own speaker;
- c. Sessions of the Assembly are called by the Chief Executive Officer of the Territories, as they are in the provinces by the Lieutenant-Governor;
- d. The members of the Assembly hold office for a maximum term of four years, but the Assembly may be dissolved at any time and an election called;
- e. The Assembly establishes the qualifications for its electors and members and fixes members indemnities;
- f. Ordinances may be disallowed by the Governor in Council within one year after passage, as is the case with acts of provincial legislatures. They are not treated simply as federal regulations, having been specifically excluded from the operation of the Statutory Instruments Act;<sup>63</sup>

---

<sup>62</sup> Op. Cit., f.n. 48.

<sup>63</sup> Stats. Can. 1971-72-73, c. 38, s. 2.

- g. The form of enactment, that is, "The Commissioner of the Northwest Territories, by and with the advice and consent of the Council of the said Territories, enacts as follows:" is similar to that used by Parliament and provincial legislatures;<sup>64</sup>
- h. Revenue of the Territories may be spent by the executive if appropriated to the public service by the Assembly, but the Assembly may not appropriate money or impose a tax without the recommendation of the Commissioner;
- i. Proceedings of the Assembly are similar in form to those of other legislative bodies, following general parliamentary rules and acting, at times, through special or standing committees and the committee of the whole;
- j. The Assembly has the power, which it has exercised, of creating other institutions of government, most notably, the Supreme Court of the Northwest Territories, the Court of Appeal and the Magistrates' Court;
- k. The Assembly delegates administrative and legislative power to the Commissioner and a number of special agents or bodies established by its legislation to perform specific functions, such as the Registrar of Securities, the Liquor Licensing Board, the Workmen's Compensation Board, the Territorial Housing Corporation and many more.

The Territories is not, of course, a province. The difference between territorial and provincial status is one of substance, based on the different relationships between those two forms of local government with the Federal Government and the difference in their respective positions as a part of Canada. These questions will be dealt with in greater detail later in this chapter; for now, however, it is useful to examine in depth the legislative powers of the Government of the Northwest Territories to

---

<sup>64</sup> There is no consistency in the provincial form of enactment, for example: in Nova Scotia; "be it enacted by the Governor and Assembly as follows": Saskatchewan; "Her Majesty by and with the advice and consent of the Legislative Assembly of Saskatchewan, enacts as follows:" Newfoundland; "The Lieutenant-Governor, by and with the advice and consent of the House of Assembly enacts as follows:".

see the role which that Government plays in relation to its own citizens, keeping in mind the powers of a provincial government over the citizens of a province.

Any discussion of the powers of the Northwest Territories must begin with the Northwest Territories Act. For convenience two of the most important sections are reproduced in their entirety.

13. The Commissioner in Council may, subject to this Act and any other Act of the Parliament of Canada, make ordinances for the government of the Territories in relation to the following classes of subjects, namely:

- (a) direct taxation within the Territories in order to raise a revenue for territorial, municipal or local purposes;
- (b) the establishment and tenure of territorial offices and the appointment and payment of territorial officers;
- (c) municipal institutions in the Territories, including local administrative districts, school districts, local improvement districts and irrigation districts;
- (d) controverted elections;
- (e) the licensing of any business, trade, calling, industry, employment or occupation in order to raise a revenue for territorial, municipal or local purposes;
- (f) the incorporation of companies with territorial objects, including tramways and street railway companies but excluding railway, steamship, air transport, canal, telegraph, telephone or irrigation companies;
- (g) the solemnization of marriage in the Territories;
- (h) property and civil rights in the Territories;
- (i) the administration of justice in the Territories including the constitution, maintenance and organization of territorial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts;
- (j) the establishment, maintenance, and management of prisons, gaols or lock-ups designated as such by the



Commissioner in Council under paragraph 44(1)(b), the duties and conduct of persons employed therein or otherwise charged with the custody of prisoners, and all matters pertaining to the maintenance, discipline or conduct of prisoners including their employment outside as well as within any such prison, gaol or lock-up;

- (o) the issuing of licenses or permits to scientists or explorers to enter the Territories or any part thereof and the prescription of the conditions under which such licenses or permits may be issued and used;
- (p) the levying of a tax upon furs or any portions of fur-bearing animals to be shipped or taken from the Territories to any place outside the Territories;
- (q) the preservation of game in the Territories;
- (r) education in the Territories, subject to the conditions that any ordinance respecting education shall always provide that a majority of the ratepayers of any district or portion of the Territories, or of any less portion or subdivision thereof, by whatever name it is known, may establish such schools therein as they think fit, and make the necessary assessment and collection of rates therefore; and also that the minority of the ratepayers therein, whether Protestant or Roman Catholic, may establish separate schools therein, and in such case the ratepayers establishing such Protestant or Roman Catholic separate schools shall be liable only to assessments of such rates as they impose upon themselves in respect thereof;
- (s) the closing up, varying, opening, establishing, building, management or control of any roads, streets, lanes or trails on public lands;
- (t) intoxicants;
- (u) the establishment, maintenance and management of hospitals in and for the Territories;
- (v) agriculture;
- (w) the expenditure of money for territorial purposes;
- (x) generally, all matters of a merely local or private nature in the Territories;
- (y) the imposition of fines, penalties, imprisonment or other punishments in respect of the violation of the provisions of any ordinance; and

- (z) such other matters as are from time to time designated by the Governor in Council.

14. (1) Nothing in Section 13 shall be construed to give the Commissioner in Council greater powers with respect to any class of subjects described therein as are given to the legislatures of the Provinces of Canada under sections 92 and 95 of the British North America Act, 1867, with respect to similar subjects therein described.

(2) Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos, and ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos.

(3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown land, game other than game declared by the Governor in Council to be game in danger of becoming extinct.

It is impossible to discuss the meaning of each of the items enumerated in section 13 within the scope of this paper. Such a discussion would involve a comprehensive review of Canadian constitutional law.

Inherent in the Canadian constitution is the principle that the legislatures of the country are supreme and, since the passage of the Statute of Westminster<sup>65</sup>, all legislative powers may be exercised by either the Dominion or provincial legislatures, or the Dominion and the provinces working in cooperation with each other, except for some types of amendments to the constitution itself.<sup>66</sup> Unlike the Parliament of Great Britain, however, no single legislature is supreme. The power to

---

<sup>65</sup> Op. Cit., f.n. 36.

<sup>66</sup> British North America Act, 1867, as amended, ss. 91(1) and 92(1).

legislate is divided by classes of subject matter between the Dominion and the provinces, and neither may legislate within an area reserved to the other. There may be areas in which both may legislate - for example, agriculture and immigration,<sup>67</sup> or particular subjects which may fall within one of the broad subject areas assigned to both the provinces and the Dominion. In either of these cases, if there is a conflict between the Dominion and the provincial legislation, the Dominion legislation will prevail.<sup>68</sup>

With that fairly simplistic view in mind, the easiest approach to take to a discussion of the legislative powers of the Assembly of the Northwest Territories is to assume initially that whatever a province can do the Territories can also do,<sup>69</sup> and then look for restrictions on the legislative powers of the Assembly that do not bind provincial legislatures.

Whenever one of the legislative powers enumerated in section 13 of the Northwest Territories Act corresponds with one of the classes of subjects listed as being reserved to the provinces in sections 92, 93 or 95 of the British North America Act, the scope of the power given by it to the Territorial Assembly is the same as that enjoyed by a provincial

---

<sup>67</sup> British North America Act, 1867, s. 95.

<sup>68</sup> For example, Mann v. The Queen, [1966] S.C.R. 238.

<sup>69</sup> Not all provinces have the same legislative powers as some are bound by restrictions which do not apply to others. The prairie provinces did not have control over their own natural resources prior to 1930 and the B.N.A. Act, 1930, R.S.C. 1970, App. II, no. 25, which gave them that control contains limitations on some powers, for example, in regard to legislating upon the rights of Indians to hunt on unoccupied Crown lands. For most purposes, however, we may assume that all provinces are constitutionally equal.

legislature, unless it is restricted by some other part of the Northwest Territories Act or another federal Act.<sup>70</sup>

This approach may create a negative impression of the Assembly's powers as it tends to focus attention upon their limits, rather than their extent. A caution, therefore, is in order. Regardless of the restrictions imposed upon the Assembly which are not faced by a provincial legislature the classes of subjects over which the Assembly may legislate are still almost as extensive as those of the provinces. A comparison of a recent table of public statutes for any of the provinces with that found in the 1975 Ordinances of the Northwest Territories shows that the Assembly deals with most of the same concerns and problems faced by provincial legislatures. Some issues, of course, have not arisen in the North to the same extent as in some provinces, such as regional planning, police forces, and securities exchanges, but neither have they arisen in many of the provinces. Each of those examples could be dealt with by the Territorial Assembly.

Restrictions may be found within the Northwest Territories Act itself or, by reference, in other Acts of Parliament. It goes without saying that if the Assembly and Parliament both legislate within their own powers on the same subject matter and the two pieces of legislation are in conflict, the Act of Parliament will prevail. In the case of the Northwest Territories this rule applies not only when the Federal Government legislates in what are normally considered to be areas of federal responsibility, but also when Parliament deals with a provincial-type

---

<sup>70</sup> R. v. Massey Harris Co. (1905), 9 C.C.C. 25; 1 W.L.R. 45; 6 Terr. L. Rep. 126 (N.W.T.C.A.); 14(1) of the N.W.T. Act provides that in no case shall one of the enumerated heads in s. 13 be construed as giving a power greater than that given to a provincial legislature.

matter in relation to the Northwest Territories, since the powers of the Assembly are, by section 13, subject to any Act of Parliament.

In theory, this could give rise to immense restrictions upon the Assembly's power, and in the past it has. Formerly, the federal Parliament has dealt with such diverse matters as wills, devolution of estates, married women's property, the establishment and maintenance of courts, use and possession of alcohol and other topics.

In practice, very few matters of substance are withheld from the Assembly in this manner at the present time, and many of those which are, are in the area of natural resource control, a subject which will be dealt with a greater length later. Many of the subjects dealt with by the Federal Government for the Northwest Territories come properly within the scope of provincial-type powers which have not been given to the Assembly and, therefore, which must be dealt with by Parliament. These also will be dealt with later.

There are, then, these three main types of limits on the legislative powers of the Assembly:

- a) federal legislation which applies to the Northwest Territories in respect of a provincial-type power, both within the Northwest Territories Act and other Acts of Parliament;
- b) specific limits imposed on the Assembly's jurisdiction by the Northwest Territories Act;
- c) limits imposed upon the Assembly's powers by the absence from section 13 of the Northwest Territories Act of a class of subject matter in respect of which the Council may legislate, and corresponding federal Acts to fill the resulting legislative void.

These "limitations", so called, are expressed here in the negative sense but they are no more true limitations than the fact that the grant of legislative powers to the Parliament of Canada is a limitation on the legislative powers of a province. The scope of provincial powers is, in general, well known and therefore provides a convenient reference point for a discussion of the scope of Territorial powers. The Northwest Territories Act and other Dominion Acts define the scope of the Assembly's legislative powers, and it is only with reference to provincial powers that they may be said to impose limitations on Territorial powers. That the powers allocated to the Territorial Government are not as extensive as those granted the provinces by the British North America Act does not of itself mean that there is any fundamental difference between the two forms of government even though the difference in the scope of the powers is substantial. The prairie provinces were, after all, still provinces before 1930 even though without control of their natural resources. One must, therefore, keep in mind the positive nature of the powers granted by the Northwest Territories Act while reading this discussion which for the sake of clarity has been framed in a negative manner.

The Northwest Territories Act at present deals with the following matters which would normally come within the scope of the powers given in section 13 to the Assembly:

- a) section 17 provides that, unless otherwise specified in an ordinance, offences against the ordinances may be dealt with in the same manner as summary offences in the Criminal Code. This is a standard provision which might normally be found in an Interpretation Ordinance;
- b) section 47 deals generally with the control, management, and protection of reindeer and gives certain powers in that regard to the Governor in Council;

- c) section 48 deals with importation of intoxicants into the Northwest Territories;
- d) section 49 deals with arrangements for the accommodation of mental incompetents and their apprehension in the event of an escape;
- e) section 51 deals with arrangements with the provinces for the care of neglected children;
- f) section 52 deals with the protection, care and preservation of archeological sites.

These provisions do not mean that the Assembly is precluded generally from broad areas of concern such as mentally incompetent people and neglected children. So long as they act within their powers, they are free to legislate in those areas so long as the ordinances do not conflict with these provisions of the Northwest Territories Act.<sup>71</sup>

Most of the similar provisions of the Northwest Territories Act which have existed in the past have been repealed, making way for replacements by Territorial ordinances. Most recently, part 2 of the Act dealing with judicature, was repealed and replaced by an ordinance.<sup>72</sup> This indirect method of adding to the powers of Assembly also explains a number of the items in section 13 which would normally be included in such general powers as property and civil rights - for example, the items listed as (o), (p), (q), and (t).

Some areas of provincial-type responsibility are dealt with in other Acts of Parliament. In practice, Parliament has rarely dealt with matters directly affecting local responsibilities in the Northwest Territories except in the Northwest Territories Act itself. Five pieces of

---

<sup>71</sup> For example, see the Mental Health Ord. R.O.N.W.T. 1974, c. M-11; Child Welfare Ord. R.O.N.W.T. 1974, c. C-3; Liquor Ord. R.O.N.W.T. 1974, c. L-7.

<sup>72</sup> R.S.C. 1970, (1st Supp.) c. 48, s. 22.

legislation do, however, deal with matters of concern to the North and restrict the powers of the Assembly. The first of these is the Criminal Code, which, by section 2, defines "Attorney General" as meaning "with respect to the Northwest Territories . . . the Attorney General of Canada."<sup>73</sup>

The Attorney General is one of the Ministers of the Crown and, among other duties, is responsible for the prosecution of criminal offenses. The effect of this definition in the Code is to remove from the Assembly any voice in, or control or management of, that part of the civil service which undertakes criminal prosecutions. As a Minister of the Crown the Attorney General is, of course, responsible to Parliament for the conduct of his office. The Territorial executive is not responsible to the Assembly and the transfer of this function to the Northwest Territories government would remove the officer responsible for prosecutions by at least one step from direct accountability to elected representatives.

This does not, however, mean that none of the functions of an Attorney General come within the purview of the Assembly. The provision of services to the Courts, legal aid, the legal profession, preparation of legislation and enforcement of Territorial ordinances are all within the purview of the Assembly. In addition, the other traditional functions of an Attorney General of advising the government on legal matters, representing the government in the civil courts, and advising the Assembly on legal matters are all performed by the Territorial Government's legal officers and the Assembly's legal advisor.

---

<sup>73</sup> R.S.C. 1970, c. C-34, as amended.



The Canada Labour Code<sup>74</sup> appears to deal completely with labour relations matters in the Territories, that is, certification of bargaining agents, unfair labour practices, and union management relations generally. Some areas of the Code specifically do not apply to the Northwest Territories,<sup>75</sup> and these areas are dealt with by the Labour Standards Ordinance<sup>76</sup> and the Fair Practices Ordinance.<sup>77</sup> The Federal Court of Appeal cast doubt upon the position taken by the Federal Department of Labour that the labour relations provisions of the Code apply universally to the Northwest Territories,<sup>78</sup> rejecting the proposition that the city of Yellowknife was a "federal work undertaking or business" within the meaning of the Code.<sup>79</sup> This decision has since been reversed by the Supreme Court,<sup>80</sup> in large measure because it would have left municipal employees in the Territories without access to a regime of compulsory collective bargaining, and because the legislation may be construed as dealing with a legislative field over which the Assembly has jurisdiction. This reasoning probably applies to all employer-employee relationships in the Northwest Territories. The Federal Government has, however, indicated its willingness to modify

---

<sup>74</sup> R.S.C. 1970, c. L-1.

<sup>75</sup> Ibid, s. 15, 27, 80.

<sup>76</sup> R.O.N.W.T. 1974, c. L-1.

<sup>77</sup> R.O.N.W.T. 1974, c. F-2.

<sup>78</sup> Except to the public service of the N.W.T. See Teachers' Association Ord. R.O.N.W.T. 1974, c. T-2; Northwest Territories Public Service Assn. Ord., R.O.N.W.T. 1974, c. N-2.

<sup>79</sup> Public Service Alliance of Canada v. City of Yellowknife (1975), 63 D.L.R. (3d) 753.

<sup>80</sup> (1976), 14 N.R. 72.

the Labour Code to permit the Assembly to pass its own labour relations legislation.<sup>81</sup>

The Land Titles Act<sup>82</sup> of Canada applies to the Northwest Territories and the Registrar of Titles is an appointee of the Federal Government, although he is, in fact, an employee of the Territorial public service. Again, the Federal Government has indicated its intention to make way for land titles ordinances for the Northwest Territories and for the Yukon.<sup>83</sup>

The Northwest Territories has its own Public Service Ordinance<sup>84</sup> but its employees are covered by the federal Public Service Superannuation Act.<sup>85</sup> That the federal government has retained control of employee pensions is a result of the transfer of a large number of employees from Federal Government departments to the public service of the Northwest Territories and the necessity for guarantees of their vested and anticipated pension rights.

The last significant area of provincial-type responsibility retained by Ottawa through the mechanism of separate legislation is the establishment and maintenance of the Northern Canada Power Commission<sup>86</sup> to

---

<sup>81</sup> Debates of the Northwest Territories Assembly, 58th Sess., January 26, 1976, p. 6.

<sup>82</sup> R.S.C. 1970, c. L-2.

<sup>83</sup> This information is from a discussion with the Chief of Legal Services, Government of the Northwest Territories.

<sup>84</sup> R.O.N.W.T. 1974, c. P-13.

<sup>85</sup> R.S.C. 1970, c. P-36.

<sup>86</sup> Northern Canada Power Commission Act R.S.C. 1970, c. N-21.

provide electricity in the Yukon and the Northwest Territories. Such public utilities are normally the responsibility of a provincial legislature, although some aspects of their operations, in connection with inter-provincial power grids, may come within the ambit of federal regulation.<sup>87</sup>

The second class of restrictions upon the Assembly's legislative powers are those which are specifically set out in the Northwest Territories Act. The form is normally that a specific class of legislative subjects is designated as being within the Assembly's powers, subject to specific limitations.

The guarantees entrenched in the constitution in respect of the rights of the Roman Catholic or Protestant minorities to establish their own schools vary to some extent from province to province, depending on whether they joined Confederation as one of the original provinces or were admitted to Canada or created by later orders in council or Acts of Parliament. Similar guarantees of religious education are set out in section 13(1) of the Northwest Territories Act. While this constitutes a restriction on the powers of the Council to legislate in regard to education, a similar restriction is imposed upon each of the provincial legislatures.

Section 15 of the Northwest Territories Act contains a limitation upon the power of the Territorial Government to enter into agreements with the Federal Government, requiring that any such agreement be approved by

---

<sup>87</sup> McNarron, C.H. "Transportation, Communication and the Constitution; The Scope of Federal Jurisdictions" (1969), 47 Can. Bar. Rev. 355.

the Governor in Council. The section appears to be unnecessary, but it underlines the position taken by the Federal Government that it generally speaks for the Territories in discussions with other governments. This is most notably manifest in the absence of representatives of the Northwest Territories Government at conferences of First Ministers, except as interested observers. Representatives of the Northwest Territories Government do attend other federal-provincial conferences as participants, for example, meetings of the ministers of health, the Conference of Uniformity Commissioners, conferences of securities registrars or motor vehicles registrars, and the like.

The Federal Government would likely question the right of the Assembly to authorize agreements with other provinces on matters of provincial concern, but the jurisdiction of the Assembly to do so does not appear to be restricted, except by those parts of the Northwest Territories Act authorizing the Commissioner to enter into such an agreement for specific purposes. The Assembly has passed legislation providing for some reciprocal arrangements with the provinces.<sup>88</sup>

A substantial limitation of the powers of Assembly to appropriate money is imposed by Section 22 of the Northwest Territories Act, which provides that any appropriation by the Assembly is subject to any specific purpose designated by Parliament in respect of funds which Parliament appropriates for the public service of the Northwest Territories. In practice this does not create any more serious a limitation than the requirement that all money bills be recommended by the Commissioner, as

---

<sup>88</sup> Maintenance Orders (Facilities for Enforcement) Ord., R.O.N.W.T. 1974, c. M-4.

long as the Commissioner is responsible to the Federal Government rather than the Assembly. The Assembly's power is limited to a veto, as is that of a provincial legislature or Parliament. Other legislatures do, of course, exercise a greater measure of political control over the executive, a principal incident of responsible government which the Northwest Territories lacks.

The Assembly's borrowing powers are limited by requiring the approval of the Governor in Council, although the requirement for such an approval in regard to lending and investing has now been removed.<sup>89</sup>

The last category of limitations on the powers of the Assembly not imposed upon the provinces is that which exists as a result of omissions from the Northwest Territories Act - that is, powers given to the provinces but not to the Territories, and the federal legislation enacted to deal with those classes of subjects.

The Assembly may not amend the constitution of the Territories. Accordingly a number of internal matters are dealt with in the Northwest Territories Act, such as the size of the Assembly, its duration, quorum, the position of the Auditor-General and similar matters.<sup>90</sup> The Assembly's powers have been expanded in connection with similar matters, such as

---

<sup>89</sup> R.S.C. 1970, c. 48 (1st Supp.), s. 21.

<sup>90</sup> Northwest Territories Act, ss. 7-12, 23.

electoral boundaries and member's indemnities,<sup>91</sup> but the Assembly has only the powers it has been given to establish its own privileges and indemnities.<sup>92</sup>

The Assembly is given the power to establish hospitals, but the wording of Section 13(u) of the Northwest Territories Act is substantially different from Section 92(7) of the British North America Act, 1867, which gives the provinces legislative power over:

"The establishment, maintenance and management of hospitals, asylums, charities, and eleemosynary institutions in and for the Province, other than marine hospitals."

Whether the Assembly is, therefore, precluded from any specific types of legislation is questionable, but in any case the effect is not significant.

The other omissions from Section 13 of the Northwest Territories Act are, for the most part, related to resource use and management. The Assembly is not given the power over "management and sale of the public lands belonging to the Province and the Timber and wood thereon" which was given to the provinces by Section 92(5) of the British North America Act.

Restrictions are placed on the types of companies which may be incorporated by the Assembly, so that railway, steamship, air transport, canal, telegraph, telephone or irrigation companies are excluded. These are all resource, transport and communication companies. Such companies are, however, still subject to the general laws in force in the Northwest

---

<sup>91</sup> The Yukon Council may now change its own size within the limits of 12 to 20 members. Stats. Can. 1974, c. 5, s. 2.

<sup>92</sup> Chamberlist v. Collins (1962), 39 W.W.R. 65; 34 D.L.R. (2d) 414 (Y.T.C.A.).

Territories.<sup>93</sup> There is no power given to the Assembly to legislate with regard to local works and undertakings. The scope of this power is uncertain as many public works are, in fact, with the purview of the Assembly; for example, the new Territorial museum, hospitals, municipal buildings and so on. Many public works and undertakings may be dealt with within the scope of other legislative powers.

Generally the management of natural resources and public lands is given to the Minister of Indian Affairs and Northern Development by the Department of Indian Affairs and Northern Development Act,<sup>94</sup> thus putting the Northwest Territories in the same position with regard to natural resources as the prairie provinces prior to the Natural Resources Agreements Acts of 1930.<sup>95</sup> Given that starting point, there are a number of specific resource and land use powers given to the Assembly. Section 13(q) of the Northwest Territories Act, dealing with the preservation of game is the most significant of these as game has been, and still is, of major importance to the economy and lifestyle of the Territories in general, and to smaller communities in particular.

By section 46 of the Northwest Territories Act, provision is made

---

<sup>93</sup> The scope of the application of provincial laws to Federal companies has been discussed by the courts in a number of cases. For a recent discussion of these cases and how the principles applied in them apply to Indians see: The Natural Parents v. Superintendent of Child Welfare, (1975), 60 D.L.R. (3d) 148 (S.C.C.).

<sup>94</sup> R.S.C. 1970, c. I-7.

<sup>95</sup> Cf. *Infra*, c. 3, for a more complete discussion of the resources question.

for the transfer of lands to the Commissioner, to be managed for the use and benefit of the Territories under the control of the Assembly. Lands around settlements have been transferred and other lands, including lands purchased by the Territories or acquired by tax sale, and roads, are automatically controlled by the Assembly. Specific power is given with regard to roads by Section 13(s) of the Act.

A brief comment is in order on the nature of the Assembly's jurisdiction with regard to Indians and Eskimos. By section 91(24) of the British North America Act, 1867 "Indians, and lands reserved for the Indians" are a federal responsibility. Since Indians, including Inuit,<sup>96</sup> are a majority in the Northwest Territories, the extent of the applicability of Territorial ordinances in relation to them is particularly important.

Section 88 of the Indian Act<sup>97</sup> provides that all laws of general application in force in a province apply to Indians, subject to any treaties, or subject to the extent that they are inconsistent with the Indian Act or any regulations made pursuant to it.<sup>98</sup> By the Interpretation Act, "province" includes the Northwest Territories.<sup>99</sup> Since the Indian Act does not apply to Inuit a similar provision is made in section 18(2) of the Northwest Territories Act:

---

<sup>96</sup> Re Eskimos, [1939] 2 D.L.R. 417 (S.C.C.).

<sup>97</sup> R.S.C. 1970, c. I-6.

<sup>98</sup> Whether this is merely declaratory or incorporates provincial legislation by reference is discussed in Natural Parents v. Superintendent of Child Welfare, op. cit., f.n. 93 and Cardinal v. Attorney-General Alberta (1973), 6 W.W.R. 205 (S.C.C.).

<sup>99</sup> R.S.C. 1970, c. I-23, s. 28.



All Laws of general application in force in the Territories are, except where otherwise provided, applicable to and in respect of Eskimos in the Territories.<sup>100</sup>

Game legislation in the Northwest Territories could and would conflict with treaty rights under treaties 8 and 11 (to the extent that these treaties are valid)<sup>101</sup>. As a result of questions about the ability of the Assembly to legislate with regard to game so as to affect Indians and Eskimos,<sup>102</sup> the Northwest Territories Act was amended in 1960<sup>103</sup> to include what are now subsections (2) and (3) of section 14, which read as follows:

14(2) Notwithstanding subsection (1) but subject to subsection (3), the Commissioner in Council may make ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos, and ordinances made by the Commissioner in Council in relation to the preservation of game in the Territories, unless the contrary intention appears therein, are applicable to and in respect of Indians and Eskimos."

(3) Nothing in subsection (2) shall be construed as authorizing the Commissioner in Council to make ordinances restricting or prohibiting Indians or Eskimos from hunting for food, on unoccupied Crown lands, game other than game declared by the Governor in Council to be game in the danger of becoming extinct.

---

<sup>100</sup> The word "Eskimos" is not legally defined. There is no "status" group of Eskimos as there is created by the Indian Act for Indians so all Inuit, regardless of racial purity, would come under this section. S. 88 of the Indian Act only applies to "status" Indians, but as Parliament does not legislate with regard to non-status Indians or Metis, they would be subject to, at least, the laws of general application whether they come within the definition of an "Indian" as that word is used in the B.N.A. Act, or not.

<sup>101</sup> Their validity as contracts is in doubt. See Re Paulette's Caveat Application (1973), 6 W.W.R. 97 (N.W.T.S.C.), reversed by 63 D.L.R. (3d) 1 (N.W.T.C.A.), affirmed by [1977] 1 W.W.R. 321 (S.C.C.)

<sup>102</sup> R. v. Kogogolak (1959), 31 C.R. 12; 28 W.W.R. 376 (N.W.T.T.C.)

<sup>103</sup> Stats. Can. 1960, c. 21, s. 1.

The effect of these provisions<sup>104</sup> is basically the same as that of the provisions of the Natural Resources Agreements on the prairies, extending local game laws to Indians in spite of the treaties, but preserving the Indians from interference with their right to hunt for food at all seasons on unoccupied Crown lands,<sup>105</sup> subject, in the Northwest Territories, to the regulation of hunting of endangered species.

There is no provision allowing the Assembly, or any province for that matter, to legislate with regard to Indian lands. Territorial laws would apply on Indian reserves so long as they did not deal with the use of the reserve itself or matters necessarily incidental to the reserve.<sup>106</sup>

This review of the operation and powers of the Assembly shows that, from the legislative point of view at least, the Government of the Northwest Territories has all the appearance of a conventional parliamentary government with power to legislate on local matters similar to a provincial government. This conclusion requires two qualifications. First, the Assembly is clearly a subordinate legislature in practice as well as in theory. The federal and provincial legislatures are also subordinate to the United Kingdom Parliament in the sense of having been created by it,

---

<sup>104</sup> Considered by the Supreme Court of Canada in R. v. Sigereak EL-53 (1966), 56 W.W.R. 478.

<sup>105</sup> Cardinal v. Attorney-General Alberta, op. cit. f.n. 98; R. v. Frank [1977] 4 W.W.R. 294 (S.C.C.); Myran et al v. R. [1976] 1 W.W.R. 196 (S.C.C.).

<sup>106</sup> Cardinal v. Attorney-General Alberta, Ibid.

but there is no longer any overriding legislative authority over Canada in that Parliament, and it has no power to alter, on its own motion, the nature or scope of the legislative powers of Canada or the provinces. The provinces are, in some senses, subordinate to the federal Parliament and Governor in Council, in that the doctrine of paramountcy and the existence of the peace, order and good government power favor the Federal Government, and in the sense that the Governor in Council retains, at least in theory, a power to disallow provincial legislation. The difference in this subordinate position of a provincial legislature and that of the Assembly of the Northwest Territories is more than one of degree, it is substantial and it indicates a basic difference in the status of the two kinds of legislatures.

The second qualification is the subject of the next part of this chapter. In Attorney General of Canada v. The Attorney General of Nova Scotia,<sup>107</sup> Rand J., relying on Re: Initiative and Referendum Act,<sup>108</sup> points to the participation of the sovereign through the Lieutenant-Governor as one of the procedural features of legislation, as opposed to the exercise of a regulation making power. This presents the issue of the role of the Commissioner of the Northwest Territories and his relationship to the Government of Canada.

---

<sup>107</sup> Op. Cit., f.n. 48.

<sup>108</sup> [1919] A.C. 935; 48 D.L.R. 18.

B. The Executive Branch of the Government of the Northwest Territories

So far this examination has focused on the legislative branch of the Territorial Government in an attempt to answer the question whether the Assembly is a mere delegate of Parliament, or a legislature in its own right. The question with regard to the executive branch is similar: is the Commissioner simply an employee of the Federal Government or is he analogous to a Lieutenant-Governor, the representative of the Crown in the Northwest Territories? Is the Territorial Civil Service merely a branch of the federal bureaucracy, a part of the Department of Indian and Northern Affairs?

The statutory basis for the office of the Commissioner is found in the Northwest Territories Act:

3(1) The Governor in Council may appoint for the Territories a chief executive officer to be styled and known as the Commissioner of the Northwest Territories.

(2) The Governor in Council may appoint a Deputy Commissioner of the Territories.

(3) If the Commissioner is absent, ill or unable to act or the office of Commissioner is vacant, the Deputy Commissioner has and may exercise, all the powers and functions of the Commissioner.

(4) The Commissioner shall administer the Government of the Territories under instructions from time to time given by the Governor in Council or the Minister.

(5) The executive powers that were, immediately before the 1st day of September, 1905, vested by any laws of Canada in the Lieutenant Governor of the Northwest Territories or in the Lieutenant-Governor of the Northwest Territories in Council shall be exercised by the Commissioner so far as they are applicable to and capable of being exercised in relation to the government of the Northwest Territories as it is constituted at the time of the exercise of such powers.

These provisions may be contrasted to those sections of the British North America Act, providing for the Lieutenant-Governors of the provinces:

58 For each Province there shall be an Officer, styled the Lieutenant-Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada.

59 A lieutenant-Governor shall hold Office during the Pleasure of the Governor General; but any Lieutenant-Governor appointed after the Commencement of the First Session of Parliament of Canada shall not be removeable within Five Years from his Appointment, except for Cause assigned, which shall be communicated to him in Writing within One Month after the Order for his Removal is made, and shall be communicated by Message to the Senate and to the House of Commons within One Week after the Commencement of the next Session of the Parliament.

60 The Salaries of the Lieutenant Governors shall be fixed and provided by the Parliament of Canada.

62 The Provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the Time being of each Province, or other the Chief Executive Officer or Administrator for the Time being carrying on the Government of the Province, by whatever Title he is designated.

The office of the Lieutenant Governor of the Northwest Territories, which disappeared in 1905 with the creation of the office of Commissioner, was based upon statutory provisions in the Northwest Territories Act of 1875,<sup>109</sup> as follows:

2 For the North-West Territories there shall be an officer styled the Lieutenant Governor, appointed by the Governor General in Council, by Instrument under the Great Seal of Canada, who shall hold office during the Pleasure of the Governor General; and the Lieutenant Governor shall administer the Government under instructions from time to time given to him by Order in Council or by the Secretary of State of Canada.

---

<sup>109</sup> Stats. Can. 1875, c. 49.

The fundamental difference between the Northwest Territories and the provinces is not in these provisions for the appointment of a chief executive officer but in the expressions indicating that Chief Executive of the Territories shall administer the Government on instructions from the Governor in Council or a federal minister, coupled with the absence of any provision in the Northwest Territories Act for an executive Council to advise the Commissioner. The difference is, of course, the absence of responsible government in the Northwest Territories.

This situation is not unique to the Northwest Territories among Canadian jurisdictions. All of the colonies which joined Confederation as provinces were, at one time or another, at similar stages or evolution towards responsible government and one, British Columbia, did not have responsible government until after it joined Confederation.<sup>110</sup> Nor is this feature a necessary incident of territorial government. The

---

<sup>110</sup> The Order in Council of May 16, 1871, admitting British Columbia into the Union, R.S.C. 1970, App. II, no. 10, adopted the terms of union as expressed in the addresses of the British Columbia legislature and the Houses of Parliament of Canada, which read in part as follows:

14. The Constitution of the Executive Authority and of the Legislature of British Columbia shall, subject to the provisions of "The British North America Act, 1867" continue as existing at the time of Union until altered under the authority of the said Act, it being at the same time understood that the Government of the Dominion will readily consent to the introduction of responsible government when desired by the inhabitants of British Columbia, and it being likewise understood that it is the intention of the Governor of British Columbia, under the authority of the Secretary of State for the Colonies, to amend the existing Constitution of the legislature by providing that a majority of its members shall be elected.

Northwest Territories, after a considerable struggle, achieved responsible government in 1897,<sup>111</sup> and maintained it until the creation of Alberta and Saskatchewan in 1905.

The presence or absence of responsible government does not alter the basic nature of our political system. The Queen, or Crown, is sovereign, exercising legislative powers in conjunction with the elected or appointed representatives of the people, and executive powers, either as a matter of prerogative or pursuant to statute, on the advice of Her ministers. Outside the United Kingdom the powers of the Crown are exercised by Chief Executive Officers appointed to represent the Crown. That in Canada these executive powers are shared by the federal and provincial governments in the same way as legislative powers are shared is commonplace.<sup>112</sup> In the

---

<sup>111</sup> Stats. Can. 1897, c. 28.

<sup>112</sup> That the Crown prerogative was exercisable by both the Federal and Provincial Governments in their appropriate spheres was settled by Mercer v. Attorney General of Ontario (1881), 5 S.C.R. 538, and The Liquidators of the Maritime Bank of Canada v. The Receiver General of New Brunswick, op. cit. f.n. 54.

The concept of a division of the powers of the Crown is difficult. The following discussion from Scott, F.R., Canadian Federalism; The Legal Perspective, (1966), 5 Alta. L. Rev. 263, at 268 may be of some assistance:

. . . the Monarchic principle in Canada was from the start and is today quite different in its social implications from its position in Great Britain. Not only do we have no resident sovereign, but in the law we talk more about the Crown than we do about the Queen . . . The term "Crown" is simply a variant on the term "State". There is no theory of the state in English public law, nor is there in Canadian public law, because the concept of the Crown suffices as a substitute. The B.N.A. Act itself uses non-monarchical language in sections, as when it says "Canada shall be liable for the debts and liabilities of each province existing at the Union"; "Nova Scotia shall be liable to Canada . . ."; "The assets enumerated in the Fourth Schedule to this Act belonging at the Union to the Province of Canada shall be the property of Ontario and Quebec conjointly". As Maitland once pointed out this is the language of statesmanship and of common life; to introduce this strict legal concept of the Queen as owner of the various assets and liabilities would be as stilted as it is accurate.

Territories these executive powers are exercised by the Commissioner, and are limited by the powers given to the Government of the Northwest Territories.<sup>113</sup> That they are exercised on the instructions of the Governor in Council or the Minister of Indian Affairs and Northern Development does not change their character or the fact that they are, nonetheless, exercised by the Commissioner.

The role of the Commissioner as Chief Executive Officer of the Northwest Territories accountable, not to the Legislative Assembly, but to the Minister and Governor in Council, has given rise to a great deal of confusion and uncertainty as to the status of the Commissioner in the governing structure, not least in the mind of the present Commissioner himself. Stuart Hodgson, the present Commissioner of the Northwest Territories, has been, in the past, adamant in asserting his status as simply another civil servant:

I as a servant of the Government of Canada . . . 114

---

<sup>113</sup> In matters over which the Assembly does not have legislative jurisdiction executive authority is delegated by the Department of Indian Affairs and Northern Development Act, R.S.C. 1970, c. I-7, to the Minister of that Department. For example, section 6 of the Act deals with the administration of lands:

6. The Minister of Indian Affairs and Northern Development

- (a) has the control, management, and administration of all lands situated in the Northwest Territories and the Yukon Territory belonging to Her Majesty in right of Canada except those lands therein that were immediately before the first day of October, 1966 under the control, management or administration of any Minister, Department, Branch or agency of the Government of Canada other than the Minister of Northern Affairs and National Resources or the Department of Northern Affairs and National Resources; . . .

The administration of lands, the beneficial use of which is appropriated to the Northwest Territories by Section 46 of the Northwest Territories Act, is regulated by the Commissioner's Land Ordinance, R.O.N.W.T. 1974, c. C-6 with the exception of some non-administrative provisions of the Territorial Lands Act, R.S.C. 1970, c. T-6, which apply to those lands.



. . . whatever I say would be and could be, and rightly so, construed as the views of the Government of Canada, because I am a federal civil servant, not a territorial civil servant. My employer is the Government of Canada, my immediate superior is the Minister of Indian Affairs and his superior is the Prime Minister of Canada.<sup>115</sup>

On the other hand, on the occasion of the swearing in of two new members of the Assembly on August 19, 1976 the Commissioner, in a brief speech, referred to his role as being the equivalent to that of a Lieutenant Governor of a Province, and identified himself as the representative of the Queen in the Northwest Territories.<sup>116</sup>

The Minister of Indian Affairs has tended to view the Commissioner as simply an employee, accountable to him for all aspects of his office. This has lead to a dispute with the Assembly, as yet unresolved, whether the Minister may instruct the Commissioner in the exercise of his legislative function. The issue arose over a private members Bill dealing with pensions for members of the Assembly, introduced in 1972, and the treatment of that Bill. The Minister saw fit to justify his actions by obtaining an opinion from the Department of Justice which advised, among other things:

1. The Commissioner has the power to refuse his assent to Bills passed by the Council. By virtue of Sections 2 and 13 of the Northwest Territories Act, legislative power is reposed in the "Commissioner in Council" which means the "Commissioner acting by and with the advice and consent of the Council". He is therefore a necessary part of the legislative process.
2. In exercising his power to assent or refuse assent, the Commissioner is subject to direction by the Minister and

---

<sup>114</sup> Debates, Northwest Territories Council, 57th Sess., Sept. 29, 1975, at p. 15.

<sup>115</sup> Ibid, at p. 16.

<sup>116</sup> The ceremony was not recorded but the writer was present at the time.

the Governor in Council. This is so because the Commissioner is a federal officer and more specifically because section 4 of that Act states that:

4 The Commissioner shall administer the government of the Territories under instructions from time to time given by the Governor in Council or the Minister.

In my view the term "Administer" is broad enough to cover both the executive and legislative functions of the Commissioner.

3. There is no basis for regarding the Governor in Council's power of disallowance for Territorial Ordinances as obsolete.<sup>117</sup>

The Assembly indicated, at a meeting with the Minister in July, 1972, that it had obtained a contrary opinion to the effect that the Minister could not instruct the Commissioner to withhold assent to Bills. This latter opinion seems more reasonable in view of the power of disallowance which exists and the absence of any power in the Commissioner to reserve his assent, such as is vested in Lieutenant-Governors.<sup>118</sup> Regardless of the answer to this problem, it demonstrates the extent to which the Federal Government feels it has control over the Commissioner. In areas where there is no question of its legal right to exercise control over the Territorial executive it is bound only by political constraints, the Commissioner not having the tenure of a Lieutenant Governor.

The Courts have also displayed some doubt regarding the Commissioner's role and, consequently, the status of the Territorial executive branch as a whole. In Royal Bank of Canada v. Scott and the Commissioner of the Northwest Territories<sup>119</sup> Morrow J. refers briefly to the constitutional history of the Territories and the office of the Commissioner and continues:

---

<sup>117</sup> Taken from a memorandum to the Assembly from the Minister, dated October 5, 1972.

<sup>118</sup> British North America Act, 1867, ss. 55, 57, 90.

<sup>119</sup> [1971] 4 W.W.R. 491 (T.C.N.W.T.).

Substituting a "Commissioner" for the "Lieutenant Governor" seemed to indicate a change from "colonial status" to one more akin to a mere department of the Federal Government. And this is the way it has continued to the present date.<sup>120</sup>

At issue in the Scott case was whether wages of a Territorial civil servant could be attached by garnishee. Morrow held that Territorial Government funds in the hands of the Commissioner as an administrator were funds of the "Queen".

The governing legislation makes it clear that the employees or the servants of the Territorial Government are not the employees or servants of the Commissioner . . . , but of Her Majesty; the Commissioner as executive officer is not the head of a State or government independent of Her Majesty but the instrument only . . . for relaying or carrying out the instructions that may come down from Her Majesty (the Canadian Government) or to him through the Ordinances passed by the Territorial Council.<sup>121</sup>

The language of the judgment on that issue is unfortunate. It is not necessary to brand the Territorial Government as a department of the Federal Government in order to say that Territorial funds are the Queen's purse. The Queen is sovereign not only of the central government but all government in Canada. Territorial funds cannot be garnisheed as funds of a separate government structure outside the central bureaucracy any more than they could be if part of the federal purse.<sup>122</sup> Morrow J. failed to acknowledge the significance of the fiscal provisions of the Northwest

---

<sup>120</sup> Ibid, at 496.

<sup>121</sup> Ibid, at 502.

<sup>122</sup> It is interesting to note that following this decision the Assembly passed a Public Service Garnishee Ordinance, O.N.W.T. 1972 (2nd Sess.), c. 12 (now R.O.N.W.T. 1974, c. P-14).

Territories Act which show clearly that the Territorial Government has its own sources of revenue, in its own consolidated revenue fund, which must be appropriated by the Assembly to the public service of the Northwest Territories. Parliament does have some control over the use of Territorial funds since the bulk of these monies are provided by the federal treasury, but immediate control lies in the Assembly and the Commissioner.<sup>123</sup> Morrow's error seems to be in equating the "Queen" with the "Government of Canada", an equation which fails to recognize that in a federal state or, indeed, an Empire, the Queen acts through the instrumentality of a number of governments.

The second issue in the Scott case, one which has continued to be a problem, was whether the Territorial Court (now the Supreme Court) of the Northwest Territories had jurisdiction to entertain a claim against the Commissioner, or whether that jurisdiction was ousted by the Federal Court Act.<sup>124</sup> After referring to the sources of the jurisdiction of the Territorial Court, Morrow briefly disposed of this problem as follows:

But nowhere in either the statute or the Ordinance found above is there to be found any language that purports to give this Court special powers or jurisdiction to decide petitions of right or other actions involving the Queen or the Government. In fact, section 17 of the Exchequer Court Act excludes any such powers or jurisdictions.

I conclude, therefore, that while this court has jurisdiction to hear and settle the present litigation it does not have jurisdiction to go further.<sup>125</sup>

---

<sup>123</sup> See N.W.T. Act, R.S.C. 1970, c. N-22, as amended by R.S.C. 1970 c. 48 (first supp.), ss. 20 et seq.

<sup>124</sup> R.S.C. 1970 (2d) supp., c. 10.

<sup>125</sup> Op Cit. f.n. 119 at p. 508.

Curiously, this problem of jurisdiction has rarely arisen in the Territories until recently. Local practitioners and counsel for the Government of the Northwest Territories have happily settled all manner of disputes in the Territorial Courts, including actions such as certiorari against territorial officials,<sup>126</sup> and mandamus, including, as an extreme, mandamus against the Registrar of Titles, a federal appointee.<sup>127</sup> This may be in part due to the perception which local lawyers had of their government, and in part due to the desire by all parties to see disputes settled quickly and easily by a resident judge operating from a Yellowknife courthouse. There is no Federal Court registry in the Northwest Territories. Whatever the reasons, the practice is changing and jurisdictional disputes are becoming more common.

The principal problems are whether actions against the Commissioner must be brought in the Federal Court as actions against Her Majesty in right of Canada and whether actions for relief in the nature of a prerogative writ against the Commissioner or other territorial officials must be brought in the Federal Court. These problems were dealt with in Pfeiffer v. The Commissioner of the N.W.T.<sup>128</sup> and Fortier Arctic Ltd. v. Liquor Control Board of the N.W.T.<sup>129</sup>, the former a certiorari application seeking to

---

<sup>126</sup> Re: McCleod, [1973] 5 W.W.R. 129; Fortier Arctic Ltd. v. Liquor Control Board, [1971] 5 W.W.R. 63.

<sup>127</sup> Purdy v. Kwaterowski, 1973, unreported; Vandal et al v. Registrar of Titles, 1971, unreported. The writer has personal knowledge of these cases.

<sup>128</sup> February 21, 1977, unreported (S.C.N.W.T.).

<sup>129</sup> Op Cit., f.n. 126.

quash an order of the Deputy Commissioner made pursuant to the Municipal Ordinance<sup>130</sup> and the latter a certiorari application to quash an order of the Liquor Control Board. The argument that section 18 of the Federal Court Act<sup>131</sup> gives exclusive jurisdiction to that Court was dealt with by looking to the definition of a "federal board, commission, or other tribunal"<sup>132</sup> in the Act and holding that tribunals created by Territorial Ordinances were established by the law of a "province".<sup>133</sup> In Pfeiffer the Deputy-Commissioner was held to be exercising his powers under the Ordinance as a persona designata. In that case Tallis, J. adopted the language of Morrow from Fortier Arctic Ltd.:

---

<sup>130</sup> R.O.N.W.T. 1974, c. M-15.

<sup>131</sup> s. 18 reads as follows:

18. The trial division has exclusive original jurisdiction
- (a) to issue an injunction, writ of certiorari, writ of prohibition, writ of mandamus or writ of quo warranto, or grant declaratory relief, against any federal board, commission or other tribunal; and
  - (b) to hear and determine any application or other proceeding for relief in the nature of relief contemplated by paragraph (a), including any proceeding brought against a federal board, commission or any other tribunal.

<sup>132</sup> The definition is as follows:

"federal board, commission or other tribunal" means any body or any person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of the Parliament of Canada, other than any such body constituted or established by or under a law of a province or any such person or persons appointed under or in accordance with a law of a province or under s. 96 of the British North America Act, 1867.

<sup>133</sup> Interpretation Act, R.S.C. 1970, c. I-23, s. 28(29): "province" means a province of Canada, and includes the Yukon Territory and the Northwest Territories.

Using provinces in the sense it is used above [in the Interpretation Act], the relevant exceptions set forth in s. 2(g) of the Federal Court Act can quite properly be read as "any such body constituted or established by or under a law of the Northwest Territories. To arrive at any other construction would, in my opinion, throw a cloud over the enactments of the Commissioner in Council and unless the language clearly does this a court should strive against it. In this respect I approve the language of C.R.O. Munro, Q.C. set forth in his brief submitted on behalf of the Attorney General of Canada where he states:

'Any argument to the contrary involves the proposition that there is no such thing as the law of the Northwest Territories. Such a proposition violates common sense, and is inconsistent with section 13 of the Northwest Territories Act which confers upon the Commissioner in Council legislative power to make laws for the Government of the Territories similar in scope to the legislative powers of the provinces. The argument in effect elevates to a constitutional issue what is really a semantic matter. It is true that all ordinances of the Northwest Territories are made under the authority of Parliament, and in that sense could be described as laws of Canada. However, they are made by the Legislature constituted for the Territories and in that sense are laws of the Territories. Whether they are to be considered one or the other is not a constitutional issue, but a question of definition of terms.'

I therefore conclude that I have jurisdiction to hear the herein motion and grant the relief sought.<sup>134</sup>

These cases do not, for the most part, rely on any particular perception of the Government of the Northwest Territories as being separate and distinct from the Federal Government, instead relying simply on the language of the Federal Court Act and the Interpretation Act. Neither do they solve the problem whether actions will lie against the Commissioner as such, rather than as a persona designata, in the ordinary courts of the Territories. The closest the Courts have come to this issue is a recent case which

---

<sup>134</sup> Op. Cit., f.n. 128, at pp. 17 and 18.

makes the resolution of this problem a matter of great concern for private litigants, yet difficult in the extreme.

Kezar v. The Queen and the Commissioner of the N.W.T. et al<sup>135</sup> was a negligence action arising out of injuries to the infant plaintiff, sustained while attending a school operated by the Territorial Government at Fort Providence, Northwest Territories, the statement of claim alleging a duty of care and negligence by the principal and some teachers in the course of their employment. The judgment does not say that actions in tort will not lie against the Commissioner in the Federal Court; instead it dismisses the action entirely against the Queen and the Commissioner on the basis that an action will not lie against the Crown at all for torts committed by Territorial civil servants. Primrose J. held that there was no statutory authority for a proceeding against the Crown in these circumstances.

There are two possibilities: that Territorial civil servants are servants of the Queen in right of Canada, in which case they are specifically excluded from the operation of the Crown Liability Act;<sup>136</sup> or that they are

---

<sup>135</sup> December 13, 1976, unreported, (F.C.T.D).

<sup>136</sup> R.S.C. 1970, c. C-38, s. 3(1) reads as follows:

"The Crown is liable in tort for the damages for which, if it were a private person of full age and of capacity, it would be liable

- (a) in respect of tort committed by a servant of the Crown, or
- (b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property."

Section 2 of the Act defines servant as follows:

"Servant includes agent but does not include any person appointed or employed by or under the authority of an ordinance of the Yukon Territory or the Northwest Territories."



members of the public service of the Northwest Territories, servants of the Crown in any event, and there is no legislation permitting an action against the Crown for torts committed by them in the course of their employment. The trial judge does not make a clear choice between these options, citing Royal Bank v. Scott<sup>137</sup> to the effect that "employees or servants of the Territorial Government are not the employees or servants of the Commissioner . . . but of Her Majesty",<sup>138</sup> followed by his own comments:

I am unable to find any distinction in the fact that in the Northwest Territories the authority is constituted by virtue of the Ordinances passed pursuant to the power given in the Northwest Territories Act and for practical purposes the State is the same as in an action against the Crown in any of the provinces of Canada.<sup>139</sup>

The Federal Court would have jurisdiction to hear claims for relief against the Commissioner or the Government of the Territories in actions for which a petition of right would have been available at common law, such as claims in contract, if the Government of the Northwest Territories comes within the meaning of the "Crown", that is, "Her Majesty in right of Canada", as those expressions are used in the Federal Court Act. There are two more or less distinct reasons why the Government of the Northwest Territories, and hence the Commissioner as Chief Executive of that Government, ought not to be included within those expressions.

The first is that the Federal Court Act cannot reasonably be construed as having been intended to apply to territorial governments. The Act gives

---

<sup>137</sup> Op. Cit., f.n. 119, at 501.

<sup>138</sup> Op. Cit., f.n. 135, at 9.

<sup>139</sup> Ibid, f.n. 135, at 10.

jurisdiction to the Federal Court in all matters in which relief is claimed against the Crown (s. 17) and in which prerogative or declaratory relief is sought against any federal board, commission or other tribunal (ss. 18, 28). If Fortier Arctic Ltd. is correct, and bodies created by ordinances of the Territories are not federal bodies within the meaning of the Act, the jurisdiction of the Federal Court in relation to the Territories is already substantially reduced. If Kezar is correct and actions based upon torts of territorial civil servants<sup>140</sup> cannot be brought in the Federal Court then the Court's jurisdiction is further emasculated in comparison with its jurisdiction over clearly federal agencies. The more compelling argument is based upon the provisions of the Act relating to payment to or by the Crown pursuant to judgments:

- Section 57 (1) Any money or costs awarded to the Crown in any proceedings in the Court shall be paid to the Receiver General of Canada.
- (3) There shall be paid out of the Consolidated Revenue Fund any money or costs awarded to any person against the Crown in any proceedings in the Court.

It would be surprising, to say the least, if Parliament, having created a regime whereby funds of the Government of the Northwest Territories were maintained in a separate consolidated revenue fund and spent by the authority of a Territorial Legislature, intended also to create a regime whereby the liabilities incurred by the Territorial Government would be paid directly from the federal purse.

---

<sup>140</sup> The reasoning in Kezar would seem to apply to actions arising from the ownership, occupation, possession or control of property (Crown Liability Act, s. 3(1)(b) and 5(1)).

The second reason why the Federal Court Act ought not to apply to the Commissioner of the Northwest Territories and the Territorial public service is that the Act itself limits its scope to claims for relief against "Her Majesty in Right of Canada"<sup>141</sup> and does not include "Her Majesty in Right of the Northwest Territories". Parliament, with its overriding power of legislation over the Territories and its power to establish Courts "for the better administration of the laws of Canada"<sup>142</sup> could, and indeed has in the past, established courts in the Territories, and could invest the Federal Court with jurisdiction to hear matters involving the Government of the Northwest Territories, but it has not, in the Federal Court Act, done so.

The expression "Crown in Right of the Northwest Territories" presents some difficulty as it would appear to import some status to the Government of the Northwest Territories which the courts, at least, are reluctant to acknowledge.<sup>143</sup> The Carrothers Commission dealt with the existence of responsible government, and rejected its existence, leaving the implication that the Government of the Northwest Territories was embraced by the term

---

<sup>141</sup> Federal Court Act, Op. Cit., f.n. 117, s. 2.

<sup>142</sup> British North America Act, 1867, s. 101.

<sup>143</sup> See particularly: Royal Bank v. Scott and Commissioner of the N.W.T., op. cit. f.n. 119.

"Crown in right of Canada".<sup>144</sup> This misconception derives from a mistaken notion of the nature of the Crown in Canada and the importation of some near mystical significance to the nomenclature of Territorial bodies.

The acceptance of the expression "Crown in Right of the Northwest Territories" does not mean that the Territories somehow becomes an independent sovereign political unit separate from Canada or equivalent to a province. That the Crown is indivisible is well settled. In our federal system the executive functions of the Crown are shared by the federal and provincial governments, neither being subordinate to the other,<sup>145</sup> subject to the legislative paramountcy of the Dominion.<sup>146</sup> References are made to the Crown in right of Canada or a province simply because the Crown acts through different governments in the exercise of its various functions, and

---

<sup>144</sup> Report of the Advisory Commission on the Development of Government in the Northwest Territories, (1966, Ottawa) at p. 159 et seq.: "As stated earlier, we do not recommend the status of provincehood for the Northwest Territories at this time. Accordingly we have sought to use titles for offices and institutions of government that will not convey the impression that the office or the institution is part of the machinery of fully responsible government. For that reason we recommend retention of the title of commissioner. We consider the terms legislative assembly, member of the legislative assembly, executive council, and department, to be descriptive of the function of the institutions and offices and recommend their use accordingly. We suggest, however, that the terms lieutenant governor, premier, minister, attorney general, and speaker imply the presence of the crown in right of the Northwest Territories and hence imply the operation of a fully responsible government or the American form of representative government. Accordingly we advise against their use."

<sup>145</sup> Liquidators of the Maritime Bank of Canada v. Receiver General of New Brunswick, op. cit., f.n. 54; Mercer v. Attorney General for Ontario, op. cit., f.n. 112.

<sup>146</sup> In Re: Silver Brothers Ltd.: Attorney General for Quebec v. Attorney General for Canada, [1932] A.C. 514; [1932] 2 D.L.R. 673; [1932] 1 W.W.R. 764 (P.C.).

maintains separate purses.<sup>147</sup>

The Federal Government could, had it chosen to do so, have retained direct legislative and executive responsibility for the Northwest Territories in Parliament and the Governor in Council. The fact is that it has not done so. It has vested power to legislate on local matters in the Assembly and has established the Commissioner as the Chief Executive Officer of the Territories to carry out those executive powers which are vested in the Crown. To say that there is a "Crown in right of the Northwest Territories" is to do no more than acknowledge the existence of a Government of the Northwest Territories having legislative and executive functions.

There may, as the Carrothers Commissioner suggests, be some merit in retaining the word "Commissioner" to differentiate him from a Lieutenant Governor of a province, but the difference is not one of function, although in the absence of responsible government his function is different, as was that of the Lieutenant Governor of the Territories prior to 1897. The difference is in the relationship of the Commissioner to the Government of

---

<sup>147</sup> In the Silver Brothers, Ltd. case, ibid, for example, the Privy Council discusses a dispute over priorities to a bankrupt's estate between the Federal and Quebec Governments in the following terms, at p. 524, A.C.: "Quoad the Crown in the Dominion of Canada the Special War Revenue Act, confers a benefit, but quoad the Crown in the Province of Quebec it proposes to bind the Crown to its disadvantage. It is true that there is only one Crown, but as regards Crown revenues and Crown property by legislation assented to by the Crown, there is a distinction made between the revenues and property in the Province and the revenues and property in the Dominion. There are two separate statutory purses. In each the in gathering and expending authority is different."

Canada. There is no magic in the words "Lieutenant Governor",<sup>148</sup> but within the Canadian context they denote a particular status which is not enjoyed by the Commissioner. While the Lieutenant Governor and the Commissioner are both appointed and paid by the Federal Government, the former are not federal officers in any sense, though they may, in the exercise of their legislative capacity, be subject to instructions from the Governor in Council. That they are appointed and may be removed by the Governor in Council does not make them subordinate or make their relationship to the Crown indirect.<sup>149</sup> They exercise their functions by virtue of the British North America Act, not federal legislation. The Commissioner, on the other hand, derives whatever powers he might enjoy from the Northwest Territories Act. While it is unlikely that the legislative powers of the Assembly or the executive powers of the Commissioner will be reduced, the Federal Government may, in theory, completely alter the nature and extent of those powers at will, or may create new territories or annex part of the Territories to existing Provinces; all actions which it cannot unilaterally undertake in relation to the Provinces. The situation is analogous to powers possessed by the Imperial Parliament

---

<sup>148</sup> Section 62 of the British North America Act, 1867, reads as follows:

"The provisions of this Act referring to the Lieutenant Governor extend and apply to the Lieutenant Governor for the time being of each Province, or other the Chief Executive Officer or the Administrator for the time being carrying on the Government of the Province by whatever title he is designated."

Before joining the Union, British Columbia and Newfoundland, for example, had "Governors" who, upon joining Canada became Lieutenant Governors.

<sup>149</sup> R. v. Carroll, [1948] S.C.R. 126; [1948] 2 D.L.R. 705.

in relation to Canada and the Provinces prior to the Statute of Westminster. That potential, which had been realized in relation to the Colonies in 1867, did not alter the nature or scope of the powers which existed in the Governments of Canada or the Provinces. That the power to exercise the executive functions of the Crown might have been taken from the Governor General did not diminish those powers and it follows that the nature or scope of the Commissioner's powers are not altered by the fact that they may be removed.

The conclusion to be drawn from this discussion is that the status of the Commissioner is analogous to that of the Assembly. Together they exercise the functions of local government, yet both are in a very real sense subordinate to the federal legislative and executive powers. This subordinate position does not change the character of these governmental institutions. They differ from their provincial counterparts only in the extent of their powers and, more important, in their relation to the Federal Government and thus in their status within Confederation.

Both the Assembly and the Office of the Commissioner are still in a period of evolution. It was not inappropriate for the Carrothers Commission in 1965 to denigrate the position of the Commissioner and recommend against calling him a Lieutenant Governor. Twelve years later, however, most of their recommendations have been implemented. The Assembly has become fully elected and has been given authority over a much broader range of legislative subject areas, with the promise of more, such as labour relations, land titles and income tax, to come. The growth of the Territorial civil service and their activity in relation to local government, education, social services,

economic development and the administration of justice have given the office of the Commissioner, and the Territorial Government as a whole, great impact on the daily lives of the inhabitants of the Territories.

In relation to the Commissioner the Carrothers Commission made these comments:

We envisage the office of Commissioner to approximate at present that of a Provincial Premier, with this difference: that he gradually work himself out of office, on instructions from the Minister of Northern Affairs, by exercising his powers as though he were partially responsible to the Legislative Assembly. We envisage that eventually the office<sup>150</sup> of Commissioner will take on the role of Lieutenant Governor.

This process can be seen to be well underway. The Commissioner is no longer a member of the Assembly and to that extent has lost one of the characteristics of a Premier. The Carrothers Commission was, of course, equating the existence of a Lieutenant Governor to the existence of responsible government. In this sense, too, there has been progress. In 1975 an executive committee was created,<sup>151</sup> having first two, and later three, members of the Assembly nominated by it, in addition to the Commissioner, Deputy Commissioner, and an Assistant Commissioner. Each of these three members has been given responsibility for a department of the Government.<sup>152</sup> This is still a long way from cabinet government and executive responsibility

---

<sup>150</sup> Op. Cit., f.n. 144, at 159.

<sup>151</sup> Debates, Northwest Territories Assembly, 55th Session, May 1, 1975, p. 3.

<sup>152</sup> At present these are Tom Butters, Arnold McCallum, and Peter Ernerk.



to the legislature,<sup>153</sup> but is a clear step in that direction, comparable to the process of evolution in the Northwest Territories prior to 1905.<sup>154</sup> It is, in some measure, prompted by the efforts of the Assembly to obtain a more direct role in the management of government affairs.<sup>155</sup>

The future development of government in the Territories will depend, in large measure, upon the policies established by the Federal Government. The content of those policies will be affected, indeed determined, by the approach the Federal Government takes to the two most pressing issues in the north today: native land claims and resource development. Before discussing the future of the Territorial Government and the place of the Territories in Canada it is essential to look at the constitutional implications of those two issues.

---

<sup>153</sup> In their role as Directors of Departments they are members of the public service and accordingly have a divided allegiance to the Commissioner and to the Assembly. The issue has not yet arisen but presumably they will be required to resign if they lose the confidence of the Assembly with respect to the operation of their own Departments. An expression by the Assembly of non-confidence in the Executive as a whole would put them in a difficult though perhaps similar position.

<sup>154</sup> See Thomas, L.H., The Struggle for Responsible Government in the North-West Territories, 1870 - 1897 (University of Toronto Press, 1956); Oliver, E.H., The Canadian North-West. (Canadian Archives, 1914) at p. 1101 et seq.

In October, 1889 the Advisory Council on Finance, composed of members of the Legislative Assembly, resigned. It was replaced by another Council which resigned after a confidence motion based upon disagreement with its position that it was only responsible in matters of finance and duties assigned to the Lieutenant Governor by the Ordinances. This resignation was at first refused by Lieutenant Governor Royal, but a later one was accepted when a matter of non-confidence dealt with finance. This constitutional crisis did not lead directly to responsible government, though it was a step to the amendments of 1897.

<sup>155</sup> The Commissioner is, of course, subject to laws passed by the Assembly and accountable, at least in the Courts, for his obligation to perform

---

155 (Con't.)

The duties imposed upon him. Simonson v. The Commissioner, op. cit., f.n. 1. The Assembly has sought a more direct method of control by requiring, in legislation, that certain functions be performed by the "Commissioner in Council". The legality of this has been questioned by the legal advisor to the Assembly and the Minister as an interference with the executive functions of the Commissioner. Debates, 58th Session, February 13, 1976, pages 910-913.

### CHAPTER THREE

#### CONTROL OF NATURAL RESOURCES IN THE NORTHWEST TERRITORIES

The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the state concerned.<sup>1</sup>

I firmly believe that at this time and for the foreseeable future, the granting of provincial status to either Territory is not a realistic alternative. I further believe that the Federal Government should continue to manage and develop the natural resources of the North for the benefit of both Northern residents and all Canadians.<sup>2</sup>

It can accurately be stated that the Federal Government does not ever plan to transfer ownership in these resources.<sup>3</sup>

The Federal Government does not regard the natural resources of the Yukon and Northwest Territories as being held in trust exclusively for the people of the region but rather as a trust for all people of Canada.<sup>4</sup>

Then there is the shadow of the pipeline! Make no mistake about it - if the powers decide that the pipeline is going to be built, then it will be built, whether you or I or anyone else has any feelings about it. Why will the authorities decide that? Simply because that is the wish of the Canadian people.<sup>5</sup>

- 
- 1 Resolution of the General Assembly of the United Nations, #1803 (XVII), December 14, 1962.
  - 2 Jean Chretien, "Statement on Development of Government in the Northwest Territories", November 10, 1969.
  - 3 Searle, D.H., "Government in the Northwest Territories", (1966), 5 Alta. Law Rev. 299, at p. 304. Mr. Searle is presently the Speaker of the Legislative Assembly of the Northwest Territories.
  - 4 Jean Chretien, quoted by Louis - Edmond Hamelin, a former member of the Territorial Council, in a speech at the University of Saskatchewan, March, 1974.
  - 5 S.M. Hodgson, Commissioner of the Northwest Territories, in a speech to the Northwest Territories Association of Municipalities, October, 1973.

In any discussion of the constitution of the Territories, its present economic, social or political structure, its future or the future of its people two issues eventually surface as key elements. These issues, control of natural resources and the settlement of native claims, have an impact and significance far beyond their own immediate confines. They are themselves inseparable and are interwoven into the fabric of northern life, intimately touching the daily lives and the future of the inhabitants of the North. They are now, in themselves, the subjects of great controversy, on a national as well as a local scale.

Something of the inter-relation, importance and complexity of these problems can be seen in the first volume of the report of the MacKenzie Valley Pipeline Inquiry conducted by Mr. Justice Thomas Berger. That report is, to-date, the most comprehensive review of all aspects of northern life, focusing on a particular area and written in contemplation of a particular development proposal. The purpose of this thesis is not to attempt to duplicate or improve upon the Berger report, but to treat some of the issues dealt with in that report from a legal perspective. The resource question and the land claims issues are here dealt with separately, and to that extent artificially. If the Berger report does nothing else it demonstrates their importance and their relationship to each other.

Implicit in the Berger report and its recommendations are a perception of the past and present legal issues involved in these two problems. In order to understand the current situation and to critically evaluate the alternatives for the future it is important to have some understanding of these issues. The discussion in this thesis is but a small part of the picture and cannot provide anything like a definitive answer to the questions which have been raised. It will be worthwhile if it supplies a piece of the puzzle and assists in the making of the decisions which Canadians, as individuals and as a nation, must make in relation to the North.

A. Allocation of Authority Over Resources: The Question of Ownership

The scheme of the British North America Act in regard to resources was to leave each province with "all lands, mines, minerals and royalties belonging to the several provinces ... at the union."<sup>6</sup> The only exceptions to this were specific public works allocated to the Dominion. The Dominion Government was given an unlimited taxing power and the exclusive right to levy indirect taxes, which for practical purposes meant customs and excise duties.

---

<sup>6</sup> British North America Act, 1867, section 109.

As the various other colonies joined Confederation they joined on basically the same terms regarding natural resources, with some variations depending upon local circumstances.<sup>7</sup>

The question of what "ownership" or "belonging to" in relation to lands in a province meant was debated after Confederation and finally settled by the Privy Council in 1883.<sup>8</sup> Ownership by the Provinces<sup>9</sup> had been obtained at various times through their history by the passage of various Civil List Acts providing that all revenues of the Crown from lands would in the future be appropriated by the local legislature for the public service in exchange for certain specified payments to the Imperial Crown.

---

7 British Columbia made a commitment to transfer land for Indian reserves to the Dominion as necessary and agreed to transfer a forty mile wide railway belt in exchange for \$100,000.00 per year. Terms of Union with British Columbia, Order in Council of May 16, 1861 (UK), R.S.C. 1970, App. II, 10. This was not so much a constitutional arrangement as a commercial one and the lands remained a British Columbia resource even though the right to administer them was transferred to the Dominion. See Attorney General for B.C. v. Attorney General for Canada (1888), 14 App. Cas. 295 (PC). Prince Edward Island did not have any Crown lands in 1873 when it joined Canada so the terms of union (Order in Council of June 26, 1873 (UK)) provided for a payment by Canada to Prince Edward Island of up to \$800,000.00 to allow it to purchase land held by large proprietors. Newfoundland was in the same position as the original provinces. British North America Act, 1949, 12-13 Geo. II, c. 22 (UK), schedule, para. 37; (R.S.C. 1970 App. II, No. 30).

8 Attorney General for Ontario v. Mercer (1883), 8 App. Cas. 767, reversing (1881), 5 S.C.R. 538.

9 Except for P.E.I. For a history of land tenure in P.E.I. see the judgement of Trainor, C.J. in Morgan v. Attorney General for P.E.I. (1974), 42 D.L.R. (3d) 603 (S.C.P.E.I., en banc).

Section 109 of the British North America Act left the sources of income and right of management with the provinces. In the words of the Earl of Selborne:

The general subject of the whole section is of a high political nature, it is the attribution of Royal territorial rights, for purposes of revenue and government, to the provinces in which they are situated or arise.<sup>10</sup>

The situation in the Northwest Territories was substantially different. Part of the North-west had been within the territory granted by the Hudson's Bay Company Charter and most of the balance was held by the Hudson's Bay Company pursuant to a license. Regardless of the nature of their ownership of the land all of the rights of the Company were surrendered to the Crown and the surrender was accepted pursuant to the authority of section 3 of the Rupert's Land Act, 1868,<sup>11</sup> on June 22, 1870.<sup>12</sup>

The Territory was from June 22, 1870 to July 15, 1870, simply a possession of Her Majesty with no form of local government and no "proprietor" except insofar as the company retained certain lands around their posts.<sup>13</sup>

---

<sup>10</sup> Attorney General for Ontario v. Mercer, op. cit., f.n.8 at p. 778.

<sup>11</sup> 31 - 32 Vict., c. 105 (UK); R.S.C. 1970, App. II, No. 6.

<sup>12</sup> See Order in Council of June 23, 1870 admitting Rupert's Land and the Northwestern Territory into the union; R.S.C. 1970 App II, No. 9.

<sup>13</sup> Though it may be argued that in relation to the Red River District the provisional government headed by Louis Riel had some legitimate authority as none other existed. See Oliver, E.H., The Canadian Northwest (Ottawa, Canadian Archives, 1914) and specifically a Letter from Joseph Howe, Secretary of State for the provinces, to William McDougall of December 24, 1869, at p. 908.

The terms of union of the Territory and Canada were negotiated with the Hudsons Bay Company and the Colonial Secretary without consultation with the inhabitants of the area until after the commencement of an armed insurrection in the Red River area. The terms of union were, accordingly, devoted in large measure to the rights and liabilities of the company vis-a-vis the Dominion Government, which had agreed to make a lump sum payment to the company in order to defray the cost to the company of the surrender.

No specific reference was made to the ownership of natural resources in the Territories after the union, though there were indirect references indicating to some extent the degree of control, "for purposes of revenue and government", which the Dominion Government was to have.

The Order in Council proper reads in part as follows:

From and after the 15th day of July, 1870 the said North-Western Territories shall be admitted into and become part of the Dominion of Canada upon the terms and conditions set forth in [the First Address of the Parliament of Canada] and that the Parliament of Canada shall from the day aforesaid have full power to legislate for the future welfare and good government of the said Territory.

No specific powers of government were given to Canada in respect of Rupert's Land in the Order in Council, but this had been adequately covered by the Rupert's Land Act, 1868, Section 5, which provided that after the union "it shall be lawful for the Parliament of Canada ... to make, ordain and establish within the land and Territories so admitted all such laws institutions and ordinances ... as may be necessary for the peace, order and good government of Her Majesty's subjects and others therein".

Although there were no direct references to proprietary rights or a civil list in the Order in Council there were a number of particular matters related to land allocation dealt with. The terms of union required the Dominion



Government to grant to the company one-twentieth of the land in the fertile belt of the prairies within fifty years; the Dominion Government was given the right to appropriate company lands "for public services" such as "public roads, canals, etc."; all titles to land given by the company were to be confirmed; the Dominion Government was to settle "the claims of Indian tribes to compensation for lands required for purposes of settlement".

These and other terms employed in the Order in Council and the various memoranda, addresses, and resolutions attached to it, together with the use of the words "transfer to the Dominion of Canada", "transference ... to the Canadian Government" and "admission into union with Canada" as if those phrases were interchangeable left the clear impression that the Dominion Government had not only legislative powers over the area but proprietary rights as well.

The circumstances surrounding this period have been dealt with adequately elsewhere.<sup>14</sup> Suffice it to say that in spite of the request of the inhabitants for local control of Crown lands, in at least the Red River area, the Federal Government made its position clear in the Manitoba Act<sup>15</sup>, section 30 of which reads:

All ungranted or waste land in the Province shall be, from and after the date of the said transfer, vested in the Crown and administered by the Government of Canada for the purposes of the Dominion.

---

<sup>14</sup> See particularly: C.C. McCaul, "The Constitutional Status of the Northwest Territories of Canada" (1884), 4 Can. Law Times, 1, 49 in relation to the period prior to 1870, and Martin Chester, The Natural Resources Question (1920, King's Printer, Winnipeg ).

<sup>15</sup> Stats. Can., 1870, c. 3; R.S.C. 1970 App. II, no. 8.

In 1870 this position was not unrealistic, particularly insofar as the Territories outside Manitoba were concerned. There was ample precedent in the United States, found in their clearly articulated policy of territorial development outlined by the Northwest Ordinance of 1787, which provided that legislatures of new districts and states should never interfere with the primary disposal of the soil by the United States.<sup>16</sup> This was especially so when one considers that the native population was not included in the body politic but was to be dealt with separately by the Federal Government. Whether the policy is as justifiable today is another question; one which will be dealt with later in this thesis.

For now, it is important to look at the legal basis for the policy as it was applied to the prairies, and interpreted in the courts.

Any doubts about the power of the Federal Government to withhold the resources of Manitoba were resolved by the British North America Act, 1871<sup>17</sup>, which, after reciting that doubts existed whether the Dominion could create a new province, declared that it could do so and could also make laws for the peace, order and good government of any territory not included in a province. Finally, it ratified the Temporary Government of Rupert's Land Act and the Manitoba Act for all purposes, effective the dates on which they had received Royal assent.

---

<sup>16</sup> Bloom, J.P. (ed.), The American Territorial System (Ohio University Press, 1973) p. 13-14.

<sup>17</sup> 34-35 Vict., c. 28 (UK); R.S.C. 1970 App. II, No. 8.

The Federal Government held to this policy through boundary extensions of Manitoba<sup>18</sup> and the creation of Alberta and Saskatchewan, giving rise to two problems which are bound to surface again in the Northwest Territories; accountability by the Federal Government for its administration of the resources and compensation to the new provinces from which the resources were withheld.

A general policy of the Federal Government had been to compensate Provinces for the loss of territorial revenues. This first appears in the terms of union of British Columbia<sup>19</sup> providing that the Province will convey the Railway Belt to the Dominion in consideration of the payment of \$100,000.00 per year by the Dominion.<sup>20</sup>

---

<sup>18</sup> Manitoba's boundaries were extended in 1881 and 1912. Curiously, when the boundaries of Ontario and Quebec were extended in 1912 by approximately 100,000,000 acres and 164,000,000 respectively, taken from the Northwest Territories, the natural resources of those areas were transferred to the two provinces. Ontario Boundaries Extension Act, Stats. Can. 1912, c. 40; Quebec Boundaries Extension Act, Stats. Can. 1912, c. 42. In contrast, the Manitoba Boundaries Extension Act, Stats. Can. 1912, c. 32, expressly reserved lands to the Dominion and took back the swamp lands transferred to the Province by Stats. Can. 1885, c. 50, and charged as a debt to the province the value of the university endowment lands transferred in 1885. For a history of these transactions see the Manitoba Swamp Lands Case; Attorney General for Manitoba v. Attorney General for Canada, [1904] A.C. 799.

<sup>19</sup> Order in Council of May 16, 1871; R.S.C. 1970, App. II, No. 10.

<sup>20</sup> This was not a retention of proprietary rights by the Dominion as in the case of prairies, nor even a constitutional transfer of proprietary rights, but simply a transaction of a commercial nature. Attorney General for British Columbia v. Attorney General for Canada (1888), 14 App. Cas. 295 (P.C.) The agreement with B.C. was amended periodically, most significantly to include a transfer of the Peace River Block to the Dominion.

In the case of Prince Edward Island all lands had been conveyed by royal grants prior to responsible government and prior to Confederation so the Island Government never had any public domain to control. Nonetheless, the terms of union sought to compensate Prince Edward Island for not having that source of revenue by a payment of \$45,000.00 a year plus up to \$800,000.00 to purchase lands of large proprietors.

Manitoba was not given similar treatment until 1882 when it was given \$45,000.00 per annum, the same as Prince Edward Island, though for a much larger area. This was increased in 1885 to \$100,000.00 per year, and in 1912 the Province was placed in the same position as Alberta and Saskatchewan, retroactive to 1908. Those latter provinces were given lump sum amounts for five years after their creation plus further amounts varying with population increases, as set forth in the Alberta Act and Saskatchewan Act.<sup>21</sup>

With the exception of Manitoba, these subsidies were granted initially upon union or creation of the province. Of necessity, therefore, they could not be based on any accurate determination of what each province would lose as a result of not having the revenue from its resources. Further, no adequate comparison between provinces was possible as not only was the area in question variable or, in the case of Prince Edward Island, impossible to determine, but the value of the resources could not be calculated in advance without some

---

21

For a general review of land subsidy policies and problems of natural resources in the Canadian constitutional structure see La Forest, G.V., Natural Resources and Public Property under the Canadian Constitution (U. of T. Press, 1969); for a more historical and political approach see Chester Martin, op. cit., f.n.14; for a more specific examination of the issues of compensation in the Prairies Provinces see: Report of the Royal Commission on Natural Resources of Saskatchewan (Dysart, A.K., Chairman, 1935); Report of the Royal Commission on the Natural Resources of Alberta (Dysart, A.K. Chairman, 1935); Report of the Royal Commission on the Natural Resources of Manitoba (Turgeon, W.F.A., Chairman, 1929).

prescience to determine what mineral resources would be found, what settlers would come and how much would they pay, or what other incidental revenues would accrue.<sup>22</sup>

This problem lead to the question of recalculating compensation to the provinces when they actually did obtain control of their resources in 1930. The Federal Government agreed to appoint three Commissions to examine this problem in respect of the three prairie provinces.<sup>23</sup> The very nature of the problem presented to the Commissioners, to determine what amounts should be paid to the provinces to put them in a position of equality with the other provinces, demonstrates the virtual impossibility of an answer since obviously the other provinces were not equal in natural resources, either physically or historically, Prince Edward Island being the extreme case in both respects as it had the smallest land area and its land had been alienated by the Crown to absentee owners prior to Confederation.

---

22 Escheat, for example, was a prerogative to be exercised by the Crown in right of the government having the ownership of "royalties" in the land. Attorney General for Ontario v. Mercer (1888), 8 App. Cas. 767 was followed in relation to Alberta in Attorney General for Alberta v. Attorney General for Canada, [1928] A.C. 475, to give escheat to the Dominion. This did not apply to Manitoba which owned "royalties" of that nature since the Manitoba Act reserved only "lands" to the Dominion and did not use the wording of section 109 of the British North America Act, "lands, mines, minerals and royalties".

23 British North America Act, 1930, 20-21 Geo. V, c. 26 (UK); R.S.C. 1970, App II, no. 25.; In relation to Manitoba the Commission had been appointed and had reported prior to the Act and a payment of \$4,584,212.49. was made to compensate for the period when Manitoba received nothing or less than Alberta and Saskatchewan. Section 22 of the Alberta agreement and section 24 of the Saskatchewan agreement provided for similar commissions. Both of these recommended payments of \$5,000,000 to each province.

The Commissions took the view, therefore, that only the resources of the particular provinces would be considered and an attempt would be made to determine what monetary benefits the province would have realized had they had control of their resources from the time of obtaining provincial status. Implicit in the question is the proposition that the provincial government would have managed the lands more efficiently from a monetary point of view or, alternatively, that the Dominion managed the land in such a way as to sacrifice monetary benefits for some other value.<sup>24</sup> The reports demonstrate the utter impossibility of any accurate accounting. In the words of the Saskatchewan Report "the exact amount of any such excess cannot possibly be ascertained by any conceivable method of treatment".<sup>25</sup> They were forced to adopt the approach indicated by Arthur Meighen, as quoted by the Saskatchewan and Alberta Commissions<sup>26</sup>: "it is not a hard matter to scramble an egg but it is a very hard matter to unscramble it. It was not a hard matter to retain the resources, but once you have retained them for fifteen to twenty years and adjusted every phase of policy to the fact that there was retention, then it becomes a matter of very great complexity ... you may get further by one way, and one way only, by presenting some concrete proposal in figures, that will appeal to a fairminded man as a square, bald, rough but honourable solution."

---

24 Assuming that Dominion made less as profit than it was required to pay to the provinces. This was the case. For example, see the Saskatchewan Report at p. 26 indicating a profit of \$2,000,000.00 in respect of Saskatchewan.

25 Report of the Royal Commission on the Natural Resources of Saskatchewan, op. cit., f.n. 21, at p. 35.

26 At p.p. 35 and 37 respectively.

In other words, the best thing to be done to compensate a province deprived of its natural resources is to arrive at a rough figure by some combination of educated guesses and mathematical ingenuity.

This did not, however, settle all questions of compensation and the agreement to establish the Commissions only covered the period after the various areas became provinces or the land was annexed to a province, as in the case of Manitoba's boundary extensions.

Only Saskatchewan held out for something more, and then only a chance. Saskatchewan claimed, as representative of the people within its boundaries, compensation for monetary loss due to the management of land resources by the Dominion for the period prior to the creation of the Province. The Federal Government went so far as to agree to submit a reference to the Supreme Court of Canada, "as to the rights of Canada and the Province respectively, before the first day of September, 1905, in or to the lands, mines or minerals (precious or base), now lying within the boundaries of the Province, and as to the alienation by Canada before the said date of any of the said lands, mines or minerals or royalties incident thereto."<sup>27</sup>

Bearing in mind that the transfer itself and the agreement to appoint a Commission were negotiated as a political settlement and were not the result of any decision by the courts or any indication that the retention was illegal,<sup>28</sup> the resulting judgment is the only one dealing directly with

---

<sup>27</sup> British North America Act, 1930, op. cit. fn. 23, Re: Saskatchewan, para. 23.

<sup>28</sup> Arguments of a legal, as well as historical, nature had been made, most notably by Professor Martin, but none had been tested by any authoritative body.

the right of the Dominion to retain natural resources in the Northwest Territories or a new province and their liability to account for their management of them to a local government representing and responsible to the people of the area.

The questions submitted to the Court were as follows:<sup>29</sup>

1. Upon Rupert's Land and the North-western Territory being admitted into and becoming a part of the Dominion of Canada under Order in Council of June 23, 1870, were all lands then vested in the Crown and now lying within the boundaries of the Province of Saskatchewan vested in the Crown:
  - (a) in the right of the Dominion of Canada
  - or
  - (b) in the right of any province or provinces to be established in such area,
  - or
  - (c) to be administered for any province or provinces to be established within such area,
  - or
  - (d) to be administered for the benefit of the inhabitants from time to time of the area?
2. Is the Dominion of Canada under obligation to account to the Province of Saskatchewan for any lands within its boundaries alienated by the Dominion of Canada prior to September 1, 1905?

Newcombe, J., speaking for the Supreme Court, summarized the main arguments of the Province basically as follows:

1. That the expression "subject to the provisions of this Act" in Section 146 of the British North America Act, 1867, required that Section 109, providing for retention of Crown lands by the provinces, and Section 92 (5), granting to the provinces the exclusive power to make laws for "the management and sale of the public lands belonging to the province and of the timber and wood thereon", be applied to the Northwest Territories.
2. That nothing in the British North America Act, 1871, which gave the Dominion power to create new provinces, expressly authorized the Dominion to hold the public domain for the purposes of the Dominion as a power to legislate does not necessarily carry with it proprietary rights.



3. If the Dominion had power to dispose of Crown land in the territory, it lost it when it created the Government of the Northwest Territories and the land then vested in the Crown in right of the inhabitants in the area, now the Governments of Manitoba, Saskatchewan and Alberta.

The Court clearly did not take these arguments too seriously, disposing of them without hearing argument by counsel for the Federal Government. Basically, the Court determined that the Order in Council, the Rupert's Land Act, 1868, and the British North America Act, 1871, by their terms each gave the Federal Government complete power to legislate for the peace, order and good government of the area. This, coupled with the peace, order and good government power in Section 91 of the British North America Act, 1867, on the basis of R. v. Burah<sup>30</sup> and Riel v. Regina<sup>31</sup> gave the Dominion Parliament plenary power to legislate for the area. The Court rejected the idea that anything existed as an inherent power of the people which detracted from that power. Relying on Attorney General for Alberta v. Attorney General for Canada<sup>32</sup>, Newcombe, J., commented:

Other passages in Lord Buckmaster's judgment are equally destructive of the argument that seeks to maintain the contention that there is some occult principle of law, not depending upon and indeed proof against legislation, whereby a province or territory of Canada or its inhabitants must have and enjoy, for its or their exclusive benefit, the waste lands of the Crown which lie within its borders.<sup>33</sup>

That the Government of the Northwest Territories could have any powers not granted by the Dominion he dismissed, saying:

and it follows also that the legislation of the Dominion was paramount and unaffected by any powers granted to the Legislature or the local government of the Territories, or any Territorial exercise of those powers which might prove to be repugnant.<sup>34</sup>

---

<sup>30</sup> (1878), 3 App. Cas. 839.

<sup>31</sup> (1885), 10 App. Cas. 675.

<sup>32</sup> [1928] A.C. 475.

<sup>33</sup> [1931] S.C.R. 263, at p. 274.

<sup>34</sup> Ibid, at p. 38-39.

Thus, the principle of local control of the resources as a constitutional necessity, argued by Chester Martin<sup>35</sup>, was dealt a crippling blow and awaited only the coup de grace from the Privy Council. This was delivered by Lord Atkin, who, after expressing doubts as to the status of Saskatchewan to demand an accounting for events which took place prior to its coming into existence said:

It may well be doubted whether there has ever been an invariable rule that a colony enjoys its own land revenue. It would appear to be a question of fact in each case whether the Crown had placed its beneficial interest in land at the disposal of the particular colony.<sup>36</sup>

The Privy Council agreed completely with the judgment of the Supreme Court but pitched its own arguments upon a more practical plane:

It is only necessary to read the addresses of the Dominion Parliament dealing with the admission of the new areas to be satisfied that the control of the whole area by the Dominion was treated as an important factor in Canadian policy ... . It is not merely improbable, it is incredible, that at that stage of the development of Canada that the resources of the immense area added to the Dominion were to be administered solely for the advantage of the sparse population scattered over thousands of square miles.<sup>37</sup>

The balance of the Province's arguments are disposed of summarily, if not well, in favour of this eminently practical and reasonable position; reasonable particularly since a large area of the north was still not within a province and was inhabited primarily by Indians and Inuit. The Privy Council was no doubt correct that it was inconceivable from the point of view of southern Canada that these few primitive and inarticulate people should control their own destiny, just as in 1870 it was inconceivable that the people of the Red River should control theirs.

---

35     Martin, op. cit., f.n. 14.

36     [1932] A.C. 28, at. p. 38.

37     Ibid, at p. 38-39

B. The Significance of Resource Control

The Courts have clearly acknowledged the complete control which the Federal Government has over resources in the Territories. They have given no guidance in relation to the transfer of control to a new province or to the Territories, as indeed they could not, for it is a question of politics, not law. There is no legal imperative to allow the local government to administer its land resources and it is not within the scope of this thesis or the competence of the writer to examine whatever political or moral imperatives may exist. It is useful, however, to look at some of the implications of ownership of these resources, "for purposes of the Dominion" as opposed to ownership "for purposes of the Territories."

The various Royal Commissions on the transfer of natural resources to the prairie provinces speak primarily in monetary terms. They indicated other consequences of control by Ottawa, but give no accurate picture of what those consequences were, as indeed, in retrospect, they could not.

The Saskatchewan Commission does, however, say that the policies of the Dominion in large measure overlapped what would have been policies of the Province so that results were not that different<sup>38</sup>, yet the report does indicate that policies would assuredly have been different, even if only because the Province would not have had the revenue and the subsidies in lieu of land provided in the Saskatchewan Act<sup>39</sup>.

---

<sup>38</sup> Report of the Royal Commission on the Natural Resources of Saskatchewan, op. cit. f.n. 21, at p. 35.

<sup>39</sup> Ibid, at p. 24.

The question is, how different would policies have been if, in 1870, control over the alienation of land had been given to the inhabitants of the area as they requested?<sup>40</sup>

John A. Macdonald was likely correct when he said, in respect of Manitoba: "The land could not be handed over to them ... it would be injudicious to have a large province which ... might interfere with this general policy of the government .... Besides the land legislation of the Province might be obstructive to immigration."<sup>41</sup>

It is one thing to say that the new Provinces of Alberta and Saskatchewan would have encouraged immigration; another to say that the predominantly Indian and Metis inhabitants of 1870 would have allowed the massive influx of people which so overwhelmed them between 1870 and 1915.

For example, it is unlikely that the inhabitants of the west would have been so willing to give the Canadian Pacific Railway 25 million acres of land plus substantial tax exemptions in perpetuity<sup>42</sup> to build a railway for the benefit of the whole country.<sup>43</sup>

---

<sup>40</sup> Chester Martin, op. cit., f.n. 14, at p. 45.

<sup>41</sup> As quoted by Martin, ibid at p. 45.

<sup>42</sup> An Act respecting the Canadian Pacific Railway Co., Stats. Can. 1885, c. 1, schedule, para. 16.

<sup>43</sup> The arguments of the Federal Government in 1885 for continued retention of Manitoba's resources were based primarily on the national policies of encouraging immigration in the West and the extension of railways, coupled with the propositions that the lands of the West ought to be used to defray the cost of building the lines which would benefit the West, and that the Federal Government ought to enjoy the direct revenues of immigration as it bore the cost of the immigration program. The government also advanced the somewhat specious argument that it was already administering the lands for benefit of Manitoba as the Federal policies were of benefit to the province. This assumes that the Federal Government knew better than the local government what was advantageous for the people. See Sessional Papers, House of Commons, 1885, no. 61, p. 2 et seq.

The economic consequences to the Government of the Northwest Territories and the new provinces of too rapid settlement is catalogued by the Report of the Royal Commission on Dominion-Provincial Relations,<sup>44</sup> demonstrating the almost impossible task of providing government services for a rapidly increasing population over which the local government has no control in respect of numbers or settlement patterns. The social consequences were, if anything, even more overwhelming.<sup>45</sup>

There were, of course, good arguments in favor of federal control.<sup>46</sup> The most significant of these was the necessity of maintaining federal control in order to implement the two great national policies of populating the west and completing the trans-continental railway link in order to create a nation which would not easily be dissolved.

---

<sup>44</sup> Report of the Royal Commission on Dominion-Provincial Relations, 3 Vols. (Ottawa, 1940). Hereafter referred to as the Rowell-Sirois Report.

<sup>45</sup> The consequences for the native people can still be seen. Two aspects of social problems among the immigrants are dealt with by James H. Grey in Red Lights on the Prairies (Macmillan, Toronto, 1971), and Booze (Toronto, 1972, Macmillan of Canada).

<sup>46</sup> Thompson, A.R. "Ownership of Natural Resources in the Northwest Territories" (1967), 5 Alta. Law Rev. 304. The author deals with the other arguments used at present to justify federal control such as the "purchase theory", the ability of Ottawa to administer resources more efficiently than Yellowknife or Whitehorse, the right of all Canadians to share in the wealth of the north and the requirement for a central economic planning authority for the north. He rejects all of these arguments.

That these policies were in fact implemented is history. It is too late to debate the respective values promoted and ignored by these policies, but it is not too late to remember that the possibility of debate existed and similar values are at play in relation to the Northwest Territories today.

The situation in the North today is significantly different in at least one aspect from that which prevailed on the prairies. In settling the West the Dominion was not primarily interested in obtaining a direct revenue from the alienation of the land, except, perhaps, insofar as it used land grants as a form of payment to railroads and as militia bounties.<sup>47</sup> The settlement led to major economic development throughout the country and particularly in central Canada.<sup>48</sup>

While having the revenue from this alienation of land would have benefited the provinces (as is apparent from the fact that they were awarded extra money after the transfer of the resources to them as compensation) they were still left with their significant resources intact to provide a continuing economic base and a tax base. The prairie provinces were basically an agricultural area and far from depleting the resources, the alienation by the Federal Government led to the development and improvement of the land into a producing area which generates the bulk of the prosperity the West now enjoys.<sup>49</sup>

---

47 The indirect revenue consequences of settlement of the West were enormous for the country as a whole and for the federal coffers in particular. See Martin, op. cit., f.n. 14, at p.p. 81 - 2; Rowell-Sirois Report.

48 Rowell-Sirois Report.

49 Although since the transfer of 1930 coal, oil, potash and uranium have become increasingly significant to the economies of Alberta and Saskatchewan.

The resources of the North, however, are for the most part non-renewable. Every ounce of gold or barrel of oil or ton of iron ore shipped from the Territories is gone forever. While the development of these resource deposits provides industry, employment and tax revenue for the North now, they must all eventually be depleted to a greater or lesser extent without necessarily providing an economic base for the future.

Recent developments in the Territories manifest the same sorts of problems encountered on the prairies. For example, it is questionable whether the Territorial Assembly would have approved of off-shore drilling in the Beaufort Sea by Dome Petroleum in 1976. The Federal Government did this, however, over the objections of native residents of the Western Arctic who will be affected by any major oil spill. Decisions in relation to the location of settlements at Mary River - Arctic Bay on Baffin Island and Resolute Bay on Cornwallis Island have not been made by the Assembly, but by Ottawa.

The consequences of development, particularly large scale resource extraction projects, are dramatically analysed in the report of the Mackenzie Valley Pipeline Inquiry. Mr. Justice Berger there details some of the effects on the lives of the people of the North which can be anticipated from a northern gas pipeline. Though he details separately the social and economic impact of the proposed pipeline construction, it is clear that, for government at least, the social costs translate directly into economic costs. Increased population will require schools, hospitals, roads, alcohol rehabilitation centres, prisons, court services, welfare payments and administration; in short a massive, and perhaps short term, increase in both capital and operating expenses of government. Most of these costs must be

born by the Territorial government, yet Berger makes it clear that there will not be a commensurate increase in revenue to that government from the sources now available to it.

What revenues would accrue to the Government of the Northwest Territories as a result of expanded economic activity associated with the pipeline? The largest single source of additional revenue attributable to general economic growth would be receipts from the sale of liquor because the Government of the Northwest Territories has a monopoly of such sales.

There would, of course, be more cash in the hands of Northerners, but the power to tax personal and corporate income lies exclusively with Ottawa.

It is clear that, unless there is a fundamental redistribution of revenues between the Government of Canada and the Government of the Northwest Territories, the deficit of the Government of the Northwest Territories, despite increased earnings from the sale of liquor, will be even greater after the pipeline is built than at present, and the Territorial Government will be even more dependent on the Federal Government than it is now.<sup>50</sup>

This extract from the Berger Report points out a major political effect of such developments, apart from the impact on government operations. So long as the Federal Government maintains direct control of the size of the Territorial budget and provides the bulk of the funds available for appropriation by the Assembly it will, of necessity, be in a position to determine the priorities for the use of those funds. As the percentage of the total funds which comes from the Federal Government increases their influences increases. This problem can be ameliorated to some extent by the termination of the tax rental agreement between the Territorial and Federal Governments whereby the Territorial Government surrenders its right to levy an income tax in exchange for a fixed sum.<sup>51</sup> Complete financial independence

---

50

Report of the Mackenzie Valley Pipeline Inquiry, volume 1, (Ottawa, 1977), p.p. 130, et seq.

51

See, for example, Financial Agreement Ordinance, 1975, O.N.W.T. 1975 (1st session), c. 3.



from the Federal Government is an illusory dream in this day of cost sharing arrangements, but those at least have the virtue of being agreements. The cost sharing type of arrangement will determine the extent of funds available to a province for a specific program but will not, as the present situation does in the Territories, determine the amount available for general government expenditures. Until the Territories have control over resource revenue, or a guarantee of at least a share of that revenue based upon a predetermined formula, the Territorial Government cannot hope to pursue its own goals or establish its own priorities. The difficulty is compounded because the resources and the revenue they would generate are not available as security for borrowing, making the present provisions of the Northwest Territories Act concerning borrowing<sup>52</sup> and the practice of borrowing only from the Federal Government, the only realistic options available under the present regime.

---

52

Section 24 of the Northwest Territories Act reads as follows:

- 24 (1) The Commissioner in Council may make ordinances
- (a) for the borrowing of money by the Commissioner for territorial, municipal or local purposes on behalf of the Territories;
  - (b) for the lending of money by the Commissioner to any person in the Territories; and
  - (c) for the investing by the Commissioner of surplus money standing to the credit of the Northwest Territories Consolidated Revenue Fund.
- (2) No money shall be borrowed under the authority of this section without the approval of the Governor in Council.
- (3) The repayment of any money borrowed under the authority of this section, and the payment of interest thereon, is a charge on and payable out of the Northwest Territories Consolidated Revenue Fund.

The appearance of dependence thus produced is self-perpetuating. Because the Territories relies upon Ottawa for financial support it cannot have truly responsible local government, for those who bear the responsibility of raising public funds must be able to account for their use of them. Because the Territorial Government cannot be responsible in this respect, the arguments goes, it ought not to be given the responsibility of managing public lands.

This argument, as fanciful and circular as it may be, is one of the corner stones of the argument supporting the federal policy of retaining resource control:

... at the moment the ownership and management of natural resources in the Territories must remain within the Federal Government ... for the present and for the foreseeable future. The immense input of public and private funds needed for resource development and the provision of government services will remain far beyond the capacity of a population that currently numbers around 32,000, over half of whom are Indians and Eskimos whose contribution to the tax base is small.<sup>53</sup>

#### C. The Transfer of Resource Control

From the previous section it is apparent that the hands which control resource management and revenue in the North control, to a very large extent, the social, economic and political future of the North. The question becomes when, if ever, the Federal Government will surrender that control and place it in the hands of the local government.

A partial surrender of control and revenue may result from the settlement of native land claims in the Territories, a subject which will be dealt with in the next chapter. Apart from a change occurring in that context, the statement of the Minister of Indian Affairs and Northern Development quoted in the preceeding section of this chapter may give the answer: not in the foreseeable future.

The arguments for and against such a transfer of power may provide the ultimate rationale for whatever decisions are taken or policies implemented but the basis of the decision will lie in the values the Federal Government hopes to preserve or promote by retaining or surrendering their control.

The values which will be fostered by a transfer of control are clear. It would give the inhabitants of the Territories the same right to control their own destiny, to manage their own affairs, as is enjoyed by other Canadians. This can be effected through a further development of Territorial political institutions as they now exist to responsible government and, ultimately, provincial status. To give resource control to a Territorial Government without a responsible executive would be a somewhat hollow development. Effective management would still be in the hands of a federal appointee obliged to do the federal bidding. Further, there would then be little point in withholding provincial status and the lack of constitutional protection which such status would give could prove, in the long run, to be a difficult and politically dangerous situation. A transfer could also be effected through the creation of alternative governing bodies having a voice in resource management which might come into existence as a result of native land claims settlements.

The importance of self-determination as a widely held value ought not to be under-estimated. In recent years, native organizations, particularly in the Mackenzie Valley, have forcefully and articulately stated their case for the management of their own affairs, and have, in the process, succeeded in gaining substantial support from Southern Canadians.

On the other side of the scale are the national policies which the Federal Government espouses and sees as possible only through management of Northern resources. These may be seen as numerous and changing, but in the end come down to one simple statement of policy: the development of Northern resources for the wealth which they will provide to the Federal Government and to the country as a whole. As articulated by the Minister the policy for the North is "to protect and further the legitimate interest of the Canadian people in developments in the North ...; in its economic development and particularly resource development and the potentially immense wealth that may result from this." <sup>54</sup>

There are, of course, other federal policies in the North not directly related to the profit motive, the most notable being the federal commitment to resolve native land claims. Aboriginal people and their land are a federal responsibility under the British North America Act <sup>55</sup> and this includes the responsibility of settling aboriginal land issues. <sup>56</sup> This responsibility has, from time to time, fallen upon the provinces or been

---

54        Ibid

55        Section 91 (24).

56        St. Catharines Milling and Lumber Co. v. The Queen (1888)  
14 App. Cas. 46 (P.C.).

shared with provincial governments, producing a generally unhappy result. Quebec has only recently negotiated a settlement of claims in the area transferred to it in 1912<sup>57</sup>. British Columbia, which must participate in land settlements on its mainland has shown marked reluctance to even discuss the issues until recently and only now are the first signs of progress in completing reserve allotments in the prairie provinces coming to light.<sup>58</sup> There is no doubt that the involvement of a second level of government in negotiations of this nature greatly complicates issues and tends to make their resolution more difficult, particularly when, as on the prairies, the provincial government pays the price in terms of Crown lands for obligations incurred by the Federal Government. In the case of the Territories, the Federal Government is only in a better position to bargain fairly if it intends, eventually, to surrender the land resources to the local government; otherwise it is, like the provinces, dealing with its own property. Nevertheless it is probably fair to say that the Federal Government can take a less self-interested view of the negotiations and is in a better position to negotiate a fair and reasonable settlement, particularly if such a settlement involves a restructuring of the political institutions of the Territories or the creation of new political units.

---

57        Quebec Boundaries Extension Act, op. cit. f.m. 18.

58        The prairie provinces are obliged by the Resources Transfer Agreements of 1930 (British North America Act, 1930, R.S.C. 1970, App. II, No. 25) to provide the required public lands for this purpose.

The question comes back, however, to resource development.

The record of the Federal Government in settling native land claims appears to be directly related to the prospects of resource development, and the present initiatives in this direction do not coincide with proposals to construct the Mackenzie Valley Gas Pipeline by chance.<sup>59</sup> At least one native organization has expressed its perception of the link between the Federal Government's policies in relation to resource development and native claims. The following is taken from a letter to the Prime Minister and the Minister of Indian Affairs and Northern Development accompanying the land claim proposal of the Committee of Original Peoples Entitlement:

Many of your officials, and indeed, some Cabinet Ministers, assure you and the country that there is a coherent public policy for northern development and that the interests of the people and the environment are put before the interests of non-renewable resource development. After all, have not past government policy papers said that people and the environment come first?

Let us Inuvialuit state to you the simple truth. First, there is no coherent policy for northern development in Canada, nor has there ever been one; second, the interests of non-renewable resource development have always been given priority; third, the planning of public policy relevant to northern Canada is woefully lacking as compared with every other circumpolar jurisdiction; and fourth, the situation is out of control. We have no hope for basic change, because we do not believe your government wishes to effect change if to do so means restricting non-renewable resource development.<sup>60</sup>

---

59 For a brief history of land claims settlements and development see the Berger Report, op. cit. f.n. 50, p. 163 et seq.

60 The proposal is for a settlement of Inuit claims in the Western Arctic. Inuvialuit Nunungat, May 13, 1977.

Apart from the specific problems of native land claims, are the values promoted by the Federal Government and those sought by the people of the Territories and the Assembly incompatible? To a significant extent, they are.

The present Legislative Assembly has generally been in favour of non-renewable resource development and, in particular, in favour of the proposals to construct a pipeline down the Mackenzie Valley.<sup>61</sup> This may change as the make-up of the Assembly changes or as political institutions in the Territories are restructured. Whether they do or not, there is, and will continue to be, a fundamental conflict between the interests of the local inhabitants and the Federal Government regarding resource developments. Even if there was complete agreement on what ought to be done, a state of affairs which human experience tells us is impossible, the fruits of the developments would be channelled into different government coffers. The Federal Government has firmly stated its determination not to surrender what may be potentially significant non-renewable resources. So long as that potential exists, it is not in the interest of the people that that government represents, almost all of whom live outside of the Territories, to abandon it. Unless there are compelling reasons to do so, it will not abandon that potential or see it cut down by treating it in the same way as the wealth of the provinces.

---

61

The Assembly's submission to the Berger Inquiry was presented by the Speaker, David Searle, on September 21, 1976.

Other policy considerations reinforce this position. Though a pipeline from Alaska to southern Canada is a matter of federal concern in any event, it shows dramatically the type of conflict which may arise. While both Federal and Territorial Governments might be attracted to the economic benefits from such a development, the Federal Government is also directly concerned with insuring adequate energy supplies to southern Canada. That factor weighs more heavily in the federal balance than in the Territorial one, while the local social and environmental consequences can be expected to be less compelling counter arguments to southerners than they are to northerners. The same considerations apply to oil and gas exploration and may extend to other resource initiatives. It would not be in the self-interest of the bulk of the Canadian population to lose the deciding voice on such issues. As long as the issues exist they will not easily surrender the power they now exercise.

The Federal Government has given control of some resource matters to the Territorial Government and can be expected to extend this in the future, but only in relation to matters which have little or no economic significance for the rest of the country. The discussion of the powers of the Legislative Assembly in the previous chapter indicates the extent of the transfer to date. The most significant items are game resources, which are still of great significance for many native northerners and the general economy of the Territories, and lands in or near settlements which are administered by the Commissioner. These do not have any impact on non-renewable resource exploitation; on the contrary, game management is adversely affected by such exploitation. An instructive example of the Federal practice in giving the government of the Territories a voice in these matters is found in the National Parks Act<sup>62</sup>. The amendments to the Act in 1974



provided that the Governor in Council could set aside lands for three parks in the Yukon and the Northwest Territories after consultation with the appropriate legislature. While the establishment of these parks will restrict resource exploration and development within their confines, it is a restriction being made at the initiative of the Federal Government and the commitment to consult with the Assembly is, therefore, harmless. On the other hand, establishing the parks could, conceivably, have an adverse effect on the economy of the Territories; accordingly the Assembly need only be consulted. It need not necessarily approve of the proposed parks as would be required in the case of a National Park in a province.

#### D. Conclusions

As a matter of law, the Federal Government is capable of retaining the resources of the Territories for an indefinite period of time, managing them as it sees fit and appropriating whatever revenues result to its own uses.

The transfer of ownership and control of those resources will take place only as it becomes convenient for the Federal Government to permit it, either because the pressure from within the Territories for local control becomes so determined that it outweighs the advantages to the Federal Government of retaining control, or there cease to be compelling policy reasons for the retention of control. These two factors work in conjunction, but circumstances in the Territories indicate that they will work slowly. The population of the Territories, as a percentage of the Canadian population, is miniscule and is unlikely to increase significantly

without an agricultural base, which does not exist, or the growth of secondary industry, which so far seems unlikely. At the same time, the nature of the Federal Government's policies is such that they do not have an objective which can be reached in any given period of time. The incentive for the Federal Government to retain control will remain so long as there is a revenue potential in Northern resources or a perceived requirement by southern Canada for the resources themselves.

The inescapable conclusion is that the Minister's statement that the resources will not be transferred in the foreseeable future is too modest. The forecast by David Searle, speaker of the Assembly, that they will never be transferred<sup>63</sup> appears to be more accurate unless there is some major change in circumstances producing factors which do not now come into play.<sup>64</sup>

---

63

Op. cit. f.n.3.

64

The policy statement issued by the Government of Canada Political Development in the Northwest Territories, (Ottawa, July 19, 1977), contains the discussion of the control of renewable and non-renewable resources in the Territories. This statement is discussed in the conclusions to this thesis.

## CHAPTER 4

### NATIVE PEOPLE AND THE CONSTITUTION OF THE N.W.T.

#### A. Introduction

The concentration of ethnic groups within a political unit can normally be expected to have an impact on the social and cultural institutions of the area, but rarely in this country has any particular racial, linguistic, religious or national group had its particular values or customs reflected in the nation's, or a province's, constitution. Our political institutions were firmly established upon the British model and have not deviated in any significant measure except insofar as our constitution has recognized and attempted to protect certain linguistic and religious values of the two original colonizing peoples in this country. Besides the recognition given to the so-called founding races, English and French, in the British North America Act and a number of provincial constitutions<sup>1</sup> only one group is set apart by the British North America Act and recognized as having some unique status under the constitution: Canada's native people.<sup>2</sup> This special recognition has, in the past, meant simply that the federal government would be free to deal with Indians in a manner different from the rest of the population and, more important, that the federal government would have the responsibility and the freedom to cope with the problems

---

1 British North America Act, 1867, ss. 91(1), 133; Manitoba Act, Stats. Can. 1870, c. 3, ss. 22, 23; Alberta Act, Stats. Can. 1905, c. 3, s. 17; Saskatchewan Act, Stats. Can. 1930, c. 42, s. 17; B.N.A. Act, 1949, 12-13 Geo. VI, c. 22(U.K.); R.S.C. 1970, App. II, n.30, schedule paragraph 17 (Newfoundland).

2 British North America Act, 1867, s. 91(24), "Indians, and lands reserved for the Indians" are enumerated as one of the classes of subjects over which the Parliament of Canada has exclusive legislative authority.

arising out of the special relationship recognized by British colonial law to exist between native peoples and the land they occupied.

Native people have at one time or another been in the majority in all parts of this country. As European settlement expanded to the west and north they were seen variously as allies or enemies, and most commonly as an obstruction; a problem to be dealt with before the orderly settlement of the frontier could continue. That approach persists, in the minds of many, in relation to the native people of the Territories today. But it is becoming increasingly clear that the old pattern of treating with Indians only to set them aside and develop the country around them, giving them little, if any, voice in determining the future of their homeland, cannot be easily accomplished in the modern North. Native people in the Territories are in a position unique among Canadian aboriginal peoples: early in the process of settlement and development they have been given the franchise, both at the Territorial and Federal level. They have begun to participate in the established political processes to the extent that the members of both the Senate and the House of Commons for the Territories are native, as is the majority of the Legislative Assembly. They have now begun their own politically oriented organizations with articulate spokesmen who are capable and prepared to use the techniques of modern political life to attain their objectives.

It is essential, therefore, to any examination of the constitution of the Northwest Territories to look not only at the established legal position of native people in Canada, but also to look at the manner in which an educated and increasingly politically conscious native majority may affect the future development of political institutions in the Northwest Territories. This chapter will, accordingly, look briefly at the present

constitutional position of native people in the north, the unique relationship of those people to the land and resources of the Territories, and the proposals which northern natives have made for the future of the Northwest Territories.

It is impossible within the confines of a thesis on the constitution of the Northwest Territories to deal with any of these areas exhaustively. A more serious limitation which must be recognized by way of preface to this chapter arises from the perspective of a white southern background and an atmosphere of English and Canadian political processes and thinking which lies in the background of this examination. This background, coupled with a limited understanding of traditional native concepts of government and politics and the fact that the views of native organizations themselves are expressed in terms of Canadian legal concepts makes any understanding of the aspirations of native people necessarily superficial and distorted. In spite of these limitations, it is hoped that the following examination will be of some assistance to the reader.

#### B. The Present Status of Native People Under the Law

A great deal has been written recently concerning the place of Native people in Canadian law and the underlying reason for that unique status.<sup>3</sup> What follows is a somewhat simplified summary of that status.

The major European colonial powers which presumed to control North America and whose population originally settled here were faced from the outset with the problem of what approach to take to the original

---

3 See, for example, the bibliography contained in Indian Claims in Canada (Research Resource Centre, Indian Claims Commission, Ottawa, 1975).

inhabitants. The "civilized nations" of Europe had for some time established their own principles upon which to determine what governing authority and what laws were to prevail in a given area and how the exigencies of war and conquest or the discovery and settlement of unoccupied territory would be accommodated by these principles. These principles could be applied and were recognized as applying by the European nations to the discovery and settlement of the Americas.

The native peoples of North America were not privy to these arrangements and the colonizing countries were not prepared to recognize that they could be. Civil institutions and concepts of sovereignty and government which existed among the native people were so different from those prevailing in Europe that they did not seem capable, to the European, of being accorded the same degree of recognition and respect that those of European nations would have received in like circumstances.<sup>4</sup> Failing that recognition they were simply considered not to exist and, for the purpose of determining issues such as sovereignty over and the laws applicable to any particular part of the Americas, the whole of the territory was taken to be uninhabited.<sup>5</sup>

This bit of legal and political legerdemain did not, however, solve the problem. The Indians were there: they were using and occupying the land and they were capable of being formidable enemies or valuable allies of the colonizing powers. The policy established by the British Government to deal with the issues arising out of these realities have left their mark on the law and administrative practices of today.

Following the Treaty of Paris of 1763, between England and France, a royal proclamation of King George III of October 7, 1763,<sup>6</sup> in addition to establishing the colonies of Quebec, Granada and East and West

Florida, established a policy for dealing with Indians and lands occupied by Indians. The principle features of this policy were, first, that Indians were to be considered to be under the protection of the sovereign

---

- 4 The reluctance to give recognition to widely disparate legal structures has persisted into this century. A dispute over control of land resources in Southern Rhodesia was settled on the basis of English law, the Privy Council having this to say in relation to native principles of land holding:

"It seems to be common ground that the ownership of the lands was "tribal" or "communal" but what precisely that means remains to be ascertained. In any case it was necessary that the argument should go to the length of showing that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them.

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor "richer than all his tribe". On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit."

In Re Southern Rhodesia, [1919] A.C. 211, at p. 233-4.

- 5 This approach was sanctioned by the leading jurists and legal philosophers of the day, such as Locke, Puffendorf and Grotius, who discussed at length the rights of civilized nations as among themselves and in relation to uncivilized and "savage" people.
- 6 R.S.C. 1970, app. II, no. 1.

and were not to be molested or abused and, second, that lands outside the colonies were reserved to the Indians and lands within the colonies could only be acquired from the Indians by the Crown, in the King's name, at a public meeting called for that purpose. While not recognizing the Indians as a sovereign people, or as normal subjects of the Crown, the government did assume a particular responsibility for their welfare and did recognize that they had some rights to use and occupy their ancestral lands, though not rights having the normal features of private ownership.

The offshoots of these policies were the creation of separate bureaucracies to deal with Indian Affairs, with appropriate legislation, and the practice of treating with native people in order to extinguish their rights of use and occupation of the land, as the exigencies of settlement and expansion required. While the relationship between native peoples and the colonizing populations has not remained static there still exists a regime of separate treatment, under different laws and administrative structures, for Indians, and there remains a recognition of their relationship to the lands which they use and occupy where that relationship has not been altered by agreement, competent authority or the realities of modern life. Both of these aspects of Indian policy are recognized in the constitution of the Northwest Territories.

The division of legislative authority over Indians and Inuit has been dealt with briefly in Chapter Two<sup>7</sup>. The Federal Government has not used the authority, which it undoubtedly has<sup>8</sup>, to create separate legislative and administrative structures for the Inuit. Further, because of those

---

7    Supra, p. 71 et seq.

8    Re Eskimos, [1939] 2 D.L.R. 417 (S.C.C.).



portions of the Indian Act<sup>9</sup> which define Indians for purposes of the Act and provide for the loss of status under the Act, a significant portion of the population of native ancestry is excluded from the operation of the Act. Finally, because the Indian Act is devoted largely to the management of Indian reserves, of which there is only one in the Northwest Territories, the federal power in relation to native people has little immediate impact upon the daily lives of those people. The extent to which those Indians included in the definition in the Indian Act are affected by it is further diminished on the practical level by the arrangements between the Territorial and the Federal Governments whereby services such as schools and social welfare are provided by agencies of the Territorial Government on the same basis as they are provided to the non-Indian population.

Why is there this major difference between the place of native people in northern society and that of their counterparts in southern Canada? The answer lies in the respective histories of the areas and in particular in differences in land use in northern and southern Canada. As a part of the agreement between Canada and the Hudson's Bay Company which was incorporated into the terms of union of the Northwest Territories with Canada,<sup>10</sup> the Federal Government agreed to dispose of the claims of Indians for compensation for lands required for purposes of settlement. Almost immediately the Federal Government embarked upon a series of negotiations to extinguish the rights of the Indians in return for compensation and

---

9 R.S.C. 1970, c. I-6, ss. 11, 12, 14, 109-113.

10 Order In Council of June 23, 1870 (U.K.); R.S.C. 1970, App. II, no. 9.

the setting aside of reserves so that orderly settlement of the west could proceed.<sup>11</sup> Those lands in the fertile belt of the prairies which would be opened up to rapid settlement by the construction of the Canadian Pacific Railroad were of most pressing concern and treaties providing for their surrender to the Crown were completed by 1877, when the Blackfoot Confederacy accepted Treaty #7 covering southern Alberta.

The treaties affecting the modern Territories were made in considerably different circumstances. Treaty 8, including parts of northern Alberta, northeastern British Columbia and the western Northwest Territories south of Great Slave Lake was signed in 1899 and 1900, after the discovery of oil in the Northwest Territories and a dramatic increase in mineral exploration activity prompted by the Yukon gold rush of 1898. Treaty 11, covering the MacKenzie Valley, was negotiated in 1921 following the discovery of oil at Norman Wells. Both treaties followed the standard pattern set by the Robinson Treaties in Ontario and the numbered treaties of the prairies. They provided for some cash compensation and the setting aside of reserves, clearly contemplating that the Indians would become an agricultural people; a somewhat ludicrous notion when one considers the terrain and climate of the area. The right of the Indians to hunt and fish on unsettled land was reserved to them.

---

11 For a brief history of treaties with the Indians in the West and North, including the N.W.T., see the Report of the MacKenzie Valley Pipeline Inquiry, volume 1 (Ottawa, 1977) pp. 165 et seq. The report is referred to hereafter as the Berger Report. For more detailed accounts see Morris, Alexander, The Treaties of Canada with the Indians (Toronto, 1880) Fumoleau, Rene, As Long As This Land Shall Last (Toronto, 1976). The former deals with western treaties up to and including treaty #7; the latter with treaties 8 and 11.

Many of the provisions of the treaties, such as the cash compensation provisions, were implemented, but the system of reserves which they contemplated was never established.<sup>12</sup> The reason for this is simple. The modest increases in the non-native population of the Territories have been prompted by isolated resource development activities and, more recently, by substantial increases in the level of government and military activity. While these changes had a major impact on the life style of native northerners<sup>13</sup> and a deleterious effect on their traditional economy and land use, there was no reciprocal effect on the activities of government and industry. The traditional activities of the native population were not necessarily inconsistent with the activities of the new settlers, and the need to remove the native population from the scene and isolate them on reserves did not arise. Further, because the non-native population tended to concentrate in very few centres which did not traditionally have a large native population, rather than spreading throughout the territory as agricultural settlers on the prairies had done, the delivery of services to the two groups tended to be separate anyway, without the establishment of separate agencies to provide those services.

Because the treaties were not of great significance to the Indians of the Territories they had no hesitation in rejecting them in the early 1970's. The settlement patterns which have developed since those treaties were signed have not eliminated the practical possibility of negotiating a new agreement establishing the relationship between the native peoples of the north and the Government of Canada and non-native society. In 1973,

---

12 One small reserve was established at Hay River in 1974.

13 Berger Report, c. 8.

seventeen chiefs acting for the Indians of the Northwest Territories presented a caveat to the Registrar of Titles for the Northwest Territories claiming aboriginal title to those areas of the Territories included in Treaties 8 and 11, for which a free-hold title had not been issued. During the subsequent hearings into a reference to the courts by the Registrar of Titles, counsel for the Indians challenged the validity of the Treaties on a number of grounds, including fraud. Though the caveat was eventually rejected on the basis of the provisions of the Land Titles Act<sup>14</sup>, the manoeuver had the desired effect. Morrow, J., in the Supreme Court of the Northwest Territories, agreed that there was an argument to be made that the Indians' rights to the land had never been surrendered or otherwise extinguished.<sup>15</sup> The only judge of the Court of Appeal to deal with the issue agreed<sup>16</sup> and the government has indicated its willingness to negotiate a land claims settlement with northern Natives without insisting upon a recognition of the earlier treaties.<sup>17</sup> The movement to negotiate a settlement of land claims, or, in the case of the Indians to renegotiate, has been given great impetus by the proposals to construct pipelines to carry gas from the Mackenzie Delta to southern markets and by discussion of similar projects to transport what may be significant supplies of hydro-carbon fuels from the arctic islands. These projects, because of their magnitude in both physical and economic terms, would have a much

---

14 R.S.C. 1970, c. L-4.

15 [1973] 6 W.W.R. 115; 42 D.L.R. (3d) 8.

16 [1976] 2 W.W.R. 193; 63 D.L.R. (3d) 1. The Supreme Court of Canada did not discuss the merits of the claim. [1977] 1 W.W.R. 321.

17 Berger Report, at p. 171.

larger impact on the population makeup of the Territories and upon all aspects of northern life than anything that has happened in the north to date. In earlier periods of our history the impact of such undertakings upon the Native population would not have been a major factor in making the decision whether to proceed with the project, except, perhaps, insofar as the physical security of the project and its work force was concerned.<sup>18</sup> Now, however, the situation is markedly different. The continued pursuit of their traditional activities by the native people would not interfere with these projects, but their ability to influence public opinion through sophisticated public relations efforts and the prospect that their position may well be supported by the courts have made it necessary to resolve these questions.

Much of the present difficulty in negotiating equitable settlements with the groups representing the native people of the Northwest Territories arises out of widely divergent views of the nature of the rights being discussed and the type of agreement which should result. Before discussing these views in any detail or looking at the specific proposals which have been put forward it is helpful to look at the legal basis of the rights in question. This examination will make it clear that the problem is not

---

18 Problems of physical security cannot be discounted in the present circumstances any more than they could be a hundred years ago. The extent of social upheaval predicted by the Berger Report as a consequence of a MacKenzie Valley Pipeline could easily produce a climate of anger and frustration leading to violence, if only among a few members of the native population. The numbers involved in the Red River and Northwest Rebellions were never large, and the target now could be a more or less indefensible pipeline. Mr. Justice Berger has made reference in his report to this possibility at pp. 198-9, and, while not predicting violence, has made his warning quite clear.

essentially a legal one at all, but a political one, amenable only to a political solution.

As mentioned earlier, the recognition of some aboriginal rights to land was a matter of British colonial policy. That policy in due course came to be recognized as a part of the domestic law in the context of disputes over ownership of land acquired from Indians. The most frequently quoted decision in regard to these problems is that of Chief Justice

Marshall of the Supreme Court of the United States in Johnston v. MacIntosh.<sup>19</sup>

It is difficult to explain the principles relied upon by the Court in that case any better than was done by the Chief Justice himself in the following extracts from his decision:

The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity in exchange for unlimited independence.

. . . .

It was necessary in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives...

Those relations which were to exist between the discoverer and the natives were to be regulated by themselves.

. . . .

They (the natives) were admitted to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion, but their rights to complete sovereignty, as independent nations were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased was denied by the original fundamental principle, that

---

19 (1833), 21 U.S. 240.

discovery gave exclusive title to those who made it.

. . . .

All our institutions recognized the absolute title of the Crown, subject to the Indian rights of occupancy, and recognize the absolute title of the Crown to extinguish that right.

. . . .

We will not enter into the controversy, whether agriculturalists, merchants and manufacturers, have a right on abstract principles to expel hunters from the territory which they possess, or to contract their limits... The British government, which was then our government, and whose rights have passed to the United States, asserted a title to all the lands occupied by the Indians, within the chartered limits of the British Colonies. It asserted also a limited sovereignty over them, and the exclusive right of extinguishing the titles which occupancy gave to them. These claims have been maintained and established as far west as the river Mississippi by the sword. The title to a vast portion of the lands we now hold originates in them. It is not for the Courts of this country to question the validity of this title, or to sustain one which is incompatible with it.

. . . .

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle be asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned. So too, with respect to the concomitant principle that the Indian inhabitants are to be considered merely as occupants, to be protected indeed, while in peace, in the possession their lands, but to be deemed incapable of transferring the absolute title to others.

. . . .

According to the theory of the British Constitution, the Royal Prerogative is very extensive, so far as respects the political relations between Great Britain and foreign nations. The peculiar situation of the Indians, necessarily considered in some respects, as a dependant, and in some respects, as a distinct people, occupying a country claimed by Great Britain, and yet too powerful and brave not to be dreaded as formidable enemies, required, that means should be adopted for the preservation of peace; and that their friendship should be secured by quieting their alarms for their property.

More, perhaps, than was necessary was extracted from that judgement, but the basis for that policy is important to present discussions and the

flavor of it is well brought out by Chief Justice Marshall. The statement of law that emerges is simply this: title to the land is in the Crown, but the Indians have the right to continue to use and cocupy it until such time as the Crown extinguishes that right.

That statement of the law was accepted as applying to Canada by the Privy Council in St. Catherines Milling and Lumber Company v. The Queen in Right of Ontario.<sup>20</sup> Again, as in Johnson v. MacIntosh, the dispute was not one to which the Indians themselves were a party, but focused on the results of the extinguishment of Indian title. The problem arose because of the somewhat anomolous situation in Canada whereby pursuant to s. 109 of the British North America Act the Crown in the right of the Provinces owned all ungranted lands (save in the Prairie provinces), yet only the Crown in right of the Dominion could extinguish the Indian title to those lands. The Court held that the Federal Government acquired nothing from the Indians; that the Provinces had throughout a dominant title burdened by Indian title which could only be removed, thus freeing the Provinces' title, and not sold. Again, because the Indians were not involved, the court did not find it necessary to elaborate upon the nature or extent of the Indians' rights, referring to the "tenure of the Indians" as a "personal and usufructuary right, dependant upon the goodwill of the sovereign".<sup>21</sup>

After the last of the major treaties was signed in northern Canada the notion of Indians as a separate people to be dealt with, not simply as citizens, but as the original inhabitants of a colonized land was lost to the minds of most Canadians. Indians came to be treated more and more as Canadian citizens, having the right to participate in the political process

---

20 (1889), 14 A.C. 46.

21 Ibid., at p. 54.



and subject, except in a few areas, to federal and provincial laws in the same manner as other citizens. The difference between treaty and non-treaty, status and non-status Indians, or between Indians and Eskimos, became in the eyes of most Canadians, insignificant, and people lost sight of the differences in law. This was demonstrated most forcefully by the statement of the Government of Canada on Indian policy of 1969 which dismissed the notion of aboriginal rights as "so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end in justice to Indians as members of the Canadian Community".

That position was not maintained for long. For the first time the Indians themselves went to court seeking an affirmation of their legal rights to the land and the continued existence of those rights was rudely brought home to Canadians and their government. In Calder et al. v. Attorney General for British Columbia<sup>22</sup> the Nishga Indians of the Nass Valley of British Columbia sought a declaration that their aboriginal rights to their ancestral lands had never been extinguished. The decision of the Supreme Court of Canada on the merits of the claim was inconclusive, with three judges finding that the rights had been extinguished, three finding that they had not and the seventh member of the panel dismissing the claim on procedural grounds. The six judges who dealt with the merits were, however, in agreement in affirming the concept of aboriginal rights and its applicability to British Columbia and the general manner in which those rights might be extinguished by the government: treaty, Act of Parliament or a pattern of dealing with the land by the Crown which was inconsistent with the continued existence of aboriginal rights.

---

22 (1973), 34 D.L.R. (3d) 145.

Again, because of the nature of the action, it was not necessary for the Court to discuss the precise nature of the rights being claimed or the degree to which they might be enforced. Judson, J. defined the rights this way:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the proclamation of 1763, the fact is that when settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right had never been lawfully extinguished. There can be no question that this right was dependant on the good will of the sovereign.<sup>23</sup>

Later in his judgement he adopts the reasoning of the Supreme Court of the United States in Tee-Hit-Ton Indians v. United States<sup>24</sup> regarding the nature of aboriginal title and the powers of government in relation to it:

In the opinion of the Court, at page 279, in discussing the nature of aboriginal title, it is said:

This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.

In my opinion in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of lands set aside for Indian occupation.

We were not referred to any cases subsequent to Tee-Hit-Ton on the problem of compensation for claims arising out of original Indian title. The last word on the subject from the Supreme Court of the United States is, therefore, that there is no right to compensation for such claims in the absence of a statutory direction to pay. An Indian Claims

---

23 Ibid., at p. 156.

24 (1955), 348 U.S. 272.

Commission Act was, in fact, passed by Congress in 1946. I note the concluding paragraph in the reasons for judgment in Tee-Hit-Ton [348 U.S. at pp. 290-1]. In my opinion, it has equal application to the appeal now before us:

In the light of the history of Indian relations in this nation, no other course would meet the problem of the growth of the United States except to make congressional contributions for Indian land rather than to subject the government to an obligation to pay the value when taken with interest to the date of payment. Our conclusion does not uphold harshness as against tenderness for the Indians, but it leaves Congress, where it belongs, the policy of Indians gratuities for the termination of Indian occupancy of government owned land rather than making compensation for its value a rigid constitutional principle.<sup>25</sup>

Hall J., writing for the minority of himself, Spence and Laskin JJ., took a similar approach in declining to discuss the details of aboriginal title.

When asked to state the nature of the right being asserted and for which a declaration was being sought, counsel for the appellants described it as "an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative enactment of the Parliament of Canada". The exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation.

. . . .

This is not a claim to title in fee but is in the nature of an equitable title or interest (see Cherokee Nation v. State of Georgia (1831), 5 Peters 1, 30 U.S. 1), a usufructuary right and a right to occupy the lands and to enjoy the fruits of the soil, the forest and of the rivers and streams which does not in any way deny the Crown's paramount title as it is recognized by the law of nations. Nor does the Nishga claim challenge the federal Crown's right to extinguish that title. Their position is that they possess a right of occupation against the world except the Crown and that the Crown has not to date lawfully extinguished that right.<sup>26</sup>

---

25 Op cit., fn. 23, at pp. 167-8.

26 Ibid., at p. 173.

For a more complete discussion of aboriginal title and some of its characteristics he refers to the Privy Council decision in Amodu Tigani v. Secretary of Southern Nigeria:<sup>27</sup>

Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. *There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.* As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. *A very usual form of native title is that of a usufructuary right, which is a mere qualification of or burden on the radical or final title of the Sovereign where that exists. In such cases the title of the Sovereign is a pure legal estate, to which beneficial rights may or may not be attached.* But this estate is qualified by a right of beneficial user which may not assume definite forms analogous to estates, or may, where it has assumed these, have derived them from the intrusion of the mere analogy of English jurisprudence. Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. (See [St. Catherine's Milling & Lumber Co. v. The Queen (1888),] 14 App. Cas. 46 and [A.-G. Que. v. A.-G. Can., 56 D.L.R. 373,] [1920] 1 A.C. 401.) But the Indian title in Canada affords by no means the only illustration of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle. Even were an estate in fee is definitely recognized as the most comprehensive estate in land which the law recognizes, it does not follow that outside England it admits of being broken up. In Scotland a life estate imports no freehold title, but is simply in contemplation of Scottish law a burden on a right of full property that cannot be split up. In India much the same principle applies. The division of the fee into successive and independent incorporeal rights of property conceived as existing separately from the possession is unknown. In India, as in Southern Nigeria, there is yet another feature of the fundamental nature of the title to land which must be borne in mind. The title, such as it is, may not be that of the individual, as in this country it nearly

---

27 [1921] 2 A.C. 399, at pp. 402-4, quoted by Hall, J. at 34 D.L.R. (3d), p. 175.

always is in some form, but may be that of a community. Such a community may have the possessory title to the common enjoyment of a usufruct, with customs under which its individual members are admitted to enjoyment as members by assignment intervivos or by succession. To ascertain how far this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

Prompted by the decision in this case there followed a surge of litigation based upon aboriginal rights. Some of these cases have helped to expand the understanding of the incidents of aboriginal title. In Re Paulette's Caveat Application<sup>28</sup> the Indians of the Northwest Territories sought the right to file a caveat in the Land Titles Office giving notice of their unextinguished aboriginal rights. In an attempt to obtain more concrete relief the Cree of Northern Quebec sought an injunction to restrain work on the James Bay development project and were successful in obtaining an interim injunction at the trial court level.<sup>29</sup> Though this judgement was overturned on appeal,<sup>30</sup> primarily on the basis that an injunction was not an appropriate remedy in the circumstances, having in mind the balance of convenience among the parties, the negotiations which ensued resulted in the most recent treaty in Canada designed to extinguish native land rights, including for the first time those of the Inuit.<sup>31</sup> Of legal

---

28 Op. cit., fn. 15 & 16.

29 Kanatewat et al. v. James Bay Development Corp. et al., unreported, Quebec Superior Court, November 15, 1973, Malouf, J.

30 Unreported, Quebec Court of Appeal, November 22, 1973. Leave to appeal to the Supreme Court of Canada denied (1973), 41 D.L.R. (3d) 1 (S.C.C.).

31 James Bay and Northern Quebec Native Claims Settlement Act, Bill C-9 2nd sess. 30th parl., passed by the Commons May 4, 1977.

significance is the fact that a court had opened the way not only to recognition of aboriginal title, but to the application of judicial remedies to protect those rights. In appropriate circumstances it might be possible for Indians to exclude trespassers from unsurrendered Indian lands.

Still there was no discussion of what those aboriginal rights meant in practical terms. Even if Indians could have access to the court to protect their possession, to what extent did they enjoy the same rights to their land as the owner of a fee simple in possession has over his. Clearly they did not have the same powers of alienation, but could they control the air space, mine the soil, insist upon their rights of natural support, enjoy the exclusive right of taking wild animals, in short, exercise those incidents of ownership which the common law has recognized for the owner of a fee? If a private individual were to interfere with their rights of use and occupation, what would be the measure of damages? Faced with those questions the position of the federal government that the rights were general and undefined has some merit.

In Isaac v. The Queen<sup>32</sup> MacKeigan, C.J.N.S., decided that the right to take game was an incident of aboriginal title which could not be interfered with by provincial legislation, contending that a provincial game law was a land use law which therefore could not apply on an Indian reserve upon which aboriginal rights had not been extinguished. Though that case represents some small progress in delimiting the incidents of aboriginal title, it is an approach which does not appear to find favor with the Supreme Court of Canada.

---

32 Unreported, Nova Scotia Court of Appeal, November 19, 1975.

In R. v. Kruger and Manuel<sup>33</sup> the Supreme Court faced a similar issue: the application of provincial games laws to Indians hunting upon lands over which they claimed that their aboriginal rights had not been extinguished. In relation to the aboriginal rights aspects of the defendants' arguments Dickson, J., speaking for a unanimous court, had this to say:

Before considering the two other grounds of appeal, I should say that the important constitutional issue as to the nature of aboriginal title, if any, in respect of lands in British Columbia, the further question as to whether it had been extinguished, and the force of the Royal Proclamation of 1763 - issues discussed in Calder v. Attorney-General of British Columbia [1973] S.C.R. 313 - will not be determined in the present appeal. They were not directly placed in issue by the appellants and a sound rule to follow is that questions of title should only be decided when title is directly in issue. Interested parties should be afforded an opportunity to adduce evidence in detail bearing upon the resolution of the particular dispute. Claims to aboriginal title are woven with history, legend, politics and moral obligations. If the claim of any Band in respect of any particular land is to be decided as a justiciable issue and not a political issue, it should be so considered on the facts pertinent to that Band and to that land, and not on any global basis. Counsel were advised during argument, and indeed seemed to concede, that the issues raised in the present appeal could be resolved without determining the broader questions I have mentioned.

Dickson refers to the problem of whether a claim to land is justiciable. In general terms it appears from the decisions in Calder, Paulette and Kanatewat that they are. Problems of extinguishment of title are another matter. In the Calder decision Judson, J. again refers to the Supreme Court of the United States, this time to the decision in United States v. Santa Fe Pacific Railway Company<sup>34</sup> which he quoted as follows:

Extinguishment of Indian title based on aboriginal possession is of course a different matter. The power

---

33 [1977] 4 W.W.R. 300 (S.C.C.).

34 (1941), 314 U.S. 339 at p. 347, quoted at 34 D.L.R. (3d) 161.

of Congress in that regard is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues. Buttz v. Northern Pacific Railroad, supra [119 U.S. 55], p. 66. As stated by Chief Justice Marshall in Johnson v. M'Intosh, supra [8 Wheaton 543], p. 586, "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts. Beecher v. Wetherby, 95 U.S. 517, 525.

This brief account of aboriginal title in Canada may be summarized with the following observations, directed particularly at the situation in the Northwest Territories.

1. The claims of the native people, distinguished from the proposals which have been made to settle land claims, are based not only upon what the Government of Canada is prepared to recognize, but upon a legal right which the courts are prepared to recognize.
2. The Government of Canada is proceeding on the basis that aboriginal rights in the Northwest Territories have not been extinguished. In relation to the Inuit, and possibly the Indians,<sup>35</sup> that position is correct in law, and the government may extinguish those rights by agreement<sup>36</sup> or by specific legislation or by simply ignoring the rights and allowing them to be extinguished gradually by the adoption of policies and dealings with the land

---

35 On the basis of the judgements of Morrow, J. and Moir, J.A. in the Paulette case, op. cit., fn 15 & 16.

36 The agreement would be with native people as a group or in reasonable groupings since the rights are collective and not individual. There is some precedent in the way in which Metis were treated on the Prairies for letting individuals have some measure of choice in whether they will participate as individuals or as members of the group.



inconsistent with aboriginal title.

3. In the absence of agreement or some other method of extinguishing aboriginal rights it is open to the native people of the Territories to take steps in the courts to prevent others from using or occupying their lands. Without commenting on the merits of such a case, the possibility of such action could be a factor which would inhibit major development projects.
4. The precise area over which the native people have aboriginal rights has not been defined and is not capable of being easily determined. In theory, the courts could establish appropriate boundaries based upon land use studies<sup>37</sup>, but they have never been called upon to undertake such a task and have no guidelines against which to measure with any precision the extent of aboriginal rights or the areas in which they exist.
5. The terms and conditions upon which aboriginal rights are to be extinguished are not justiciable questions. They can only be practically settled by an agreement, or, failing that, legislative fiat. In the interim the extent to which native people may use and occupy the soil has already been significantly reduced by the application of such things as game laws, land use regulations, mineral leasing arrangements and the granting of freehold tenure under the Territorial Lands Act.<sup>38</sup> Those restrictions do not

---

37 For example, a detailed study of the extent of use and occupation of land in the N.W.T. by the Inuit has now been completed for the Department of Indian Affairs and Northern Development. Report, Inuit Land Use and Occupancy Project, 3 volumes (Ottawa, 1976).

38 R.S.C. 1970, c. T-6.

change the character of the negotiations which are now taking place. The issues are not of a commercial nature, but political, and relate to the manner in which the colonizing people will treat the original inhabitants of the Canadian north as a people, and the relationship which these two groups will have as they begin to share the same physical space.

With that preamble it is now in order to look at the proposals which have been made by the native people. These proposals are not concerned simply with compensation, as if this process was merely another form of land sale or expropriation, but the basis upon which the colonizers will enter and live in the territory in question, and the basis upon which the native people will remain.

#### C. Land Claims Proposals in the Northwest Territories

The present state of land claims negotiations in the Territories is bound to create confusion in the minds of the average interested citizen. To date there has been one widely publicized declaration of principle, three detailed proposals in the form of draft agreements in principle (one of which has been withdrawn for further study) and one draft discussion paper. In addition the government has been presented with extensive and articulate comments from Mr. Justice Berger in his report on the MacKenzie Valley pipeline.<sup>39</sup> All of these documents and their possible significance for the future of the constitution of the Northwest Territories will be discussed below.

---

39 Berger Report, op. cit. fn 11, c. 11, pp. 163 et seq.

## I. The Inuit Proposals

Inuit groups have presented two separate comprehensive<sup>40</sup> land claims to the federal government. Both of these are very detailed and take the form of draft agreements in principle between the Government of Canada and the organization representing the Inuit of the area to which the claim relates. The first of these draft agreements was presented by the Inuit Tapirisat of Canada (I.T.C.) on February 27, 1976<sup>41</sup> on behalf of all Inuit of the Northwest Territories and the Yukon Territory. The area covered by the proposal is shown on the attached map (Figure 1). This proposal (hereafter referred to as the "Nunavut proposal") was withdrawn in the fall of 1976, leading to a split in the previously unified land claims position of the Inuit. On May 13, 1977 the Committee for Original Peoples' Entitlement (C.O.P.E.) presented another draft agreement in principle on behalf of the Inuit of the western arctic region of the Northwest Territories and Yukon Territory, covering the area shown on the attached map (Figure 2). This proposal, which adopts many of the features of the Nunavut proposal, will be referred to as the "C.O.P.E. proposal".<sup>42</sup> Because of the similarities between the two and the wholesale adoption by C.O.P.E. of parts of the

---

40 The expression "comprehensive land claim" has come to denote claims by native people for the settlement of aboriginal rights issues, as opposed to claims in relation to specific areas of land or land entitlement arising from prior treaties.

41 The proposal has been published in (1976), 18 Musk-Ox 3.

42 The C.O.P.E. proposal is entitled Inuvialuit Nunungat. Inuvialuit is the equivalent in the Western Arctic dialect of Inuit. The use of the word Inuit will be continued hereafter to indicate both Eastern and Western Arctic Eskimos except when discussing the C.O.P.E. proposal.

007

155



# WESTERN ARCTIC REGION



Nunavut proposal, the Nunavut proposal is still important in itself and is an indication of the thinking of the leadership of I.T.C. and their advisors. At this writing I.T.C. is preparing to make a new submission to the Federal Government and indications are that it will be substantially the same as the original Nunavut proposal.

The significant features of these proposals, and those presented by the Indian Brotherhood of the Northwest Territories and the Metis Association of the Northwest Territories are that they come not from the Government but from the native organizations, and that they are concerned not only with the surrender of land and the consequences of such a surrender, but with political and economic structures to be established in the territory to be affected. The four basic goals of the Nunavut proposal, repeated in the C.O.P.E. proposal, are expressed as follows:

- (1) preserve Inuit identity and the traditional way-of-life so far as possible;
- (2) enable Inuit to be equal and meaningful participants in the changing north and in Canadian society;
- (3) achieve fair and reasonable compensation or benefits to the Inuit in exchange for the extinguishment of Inuit claims, and in a form which serves better to achieve the first two goals;
- (4) protect and preserve the arctic ecology and environment.

In relation to land ownership the I.T.C. proposed that they be entitled to select 250,000 square miles to be held by the Inuit in fee simple, including sub-surface rights to a depth of 1,500 feet below the surface.<sup>43</sup> Approval of the appropriate Inuit body would be necessary

---

43 The criteria and procedure to be used in the selection are set out in great detail in the proposal, as are other elements of the proposal which will only be touched upon here.

before any developments could proceed in relation to the resources below 1,500 feet. In addition, Inuit would be entitled to a royalty of three percent of the world price of any resources extracted from beneath 1,500 feet anywhere in the area covered by the proposal. The other major resource provision of the proposal is that which provides that the Inuit shall have the exclusive right to hunt some species of game for subsistence or commercial purposes; the exclusive right to hunt or trap fur-bearing animals subject to existing licenses given to non-Inuit; and the control of quotas and licenses in respect of other animals through their majority position on the Nunavut Council on Game.

These provisions are, of course, important to the general scheme of the Nunavut proposal. As they stand they would not be particularly objectionable in the eyes of Federal or Territorial Governments as they are, subject to haggling over the details, similar in principle to the kind of provisions contained in the prairie treaties and more recently in the Alaska Native Claims Settlement Act<sup>44</sup> and the James Bay Agreement in Quebec.<sup>45</sup> There is a surrender of aboriginal rights over the Territory concerned, a setting aside of some lands for the Inuit, compensation in the form of royalties and the protection of hunting and fishing rights.

The remarkable aspects of the Nunavut proposal are those which relate to government structures in the area. There are a number of different structures proposed, all of which are designed to insure Inuit control of various aspects of the political, economic and social life of

---

44 (1971) P.L. 92-203 (U.S.), amended (1976), P.L. 94-204.

45 Op. cit., fn.31.

the area.<sup>46</sup>

The Nunavut proposal suggests a division of the Northwest Territories and the consequent creation of a new Territory, to be called Nunavut, with the boundaries as shown on Figure 1, excluding the present town of Inuvik. The comments accompanying the proposal make these points about the creation of a separate territory:

The purpose of Nunavut has already been discussed by the Negotiating Committee in making its decision to request the Prime Minister to create such a Territory. In brief, the basic idea is to create a Territory the vast majority of people within which, will be Inuit. As such, this Territory and its institutions will better reflect Inuit values and perspectives than with the present Northwest Territories. The Inuit should have actual control through their voting power, at least for the foreseeable future. No new or different powers are requested, other than voting requirements - section 404; trilingualism - section 405; and police - section 406, than exist at present for a Territory. That is, "separate status" is not contemplated. The Federal Government cannot object on this point of legislative powers of the new Territory. The creation of Nunavut should mean that the Yukon and Northwest Territories will more quickly be able to become provinces, leaving Nunavut as a Territory relatively undeveloped for the present, and as a federal jurisdiction. This feature may well appeal to non-natives in both Yellowknife and Ottawa.

The proposed differences between the structure of the present Territorial Government and Nunavut referred to in the comment are the

---

46 A word is in order about the meaning of the word Inuit. All of the proposals have some form of eligibility requirement in which they define Inuit, Inuvialuit, Dene or native. In the case of the Nunavut and C.O.P.E. proposals the definition of Inuit and Inuvialuit combines features of race, (including people who are of 1/4 or more Inuit blood,) citizenship, and birth or residence in the area concerned for at least ten years during the persons life time. In addition there is provision in both proposals for the enrollment of any persons considered by the local community to be entitled to participate, with a five year limit on such enrollment in the case of the Nunavut proposal and a three year limit in the case of the C.O.P.E. proposal.



establishment of a Territorial police force, the entrenchment of English, French and Inuktitut as official languages, with primary school education available in Inuktitut, and limitation of the franchise to those who have lived in Nunavut for at least ten years.

Notwithstanding the pretence of simply asking for a separate Territory, not a new idea,<sup>47</sup> the other recommendations contained in the proposal would, if accepted, destroy any illusion of territorial status for Nunavut similar to that now enjoyed by the Northwest Territories. The land compensation aspects alone would make things difficult for the Nunavut Territory, in particular frustrating any hopes such a territory might have of obtaining some measure of financial independence from the Federal Government. The 250,000 square miles which would be held by Inuit organizations would include all areas with promising mineral deposits to a depth of 1,500 feet, depriving both Federal and Territorial Governments of any potential revenue from the sale of mineral leases. The three percent royalty would further cut into potential Territorial revenues as would requirements for contributions by the Federal Government to the maintenance of the Nunavut Council on Game and the Inuit Social and Economic Fund. In addition are the provisions which would exempt from taxation for twenty years the income accruing to Inuit organizations or individuals from the transfer of shares in Inuit organizations or the transfer of lands and exempting in perpetuity from all forms of taxation the property of Inuit community and regional corporations and the income derived from royalties.

Fiscal considerations apart, the Nunavut proposal contains a number

---

47 See references to the proposal for a Nunassiaq Territory in 1962, supra, c. 1, p. 21 et seq.

of elements which would remove decision making powers from the Territorial or Federal Governments and place them in the hands of other agencies.

These agencies invariably would be structured so as to insure that the natural political domination, which the Inuit would enjoy because they constitute a majority of the population, would be preserved and, indeed, enhanced regardless of population changes.<sup>48</sup> These agencies include the following:

- 
- 48 Some provisions of the Nunavut proposal are designed to insure Inuit participation in normal government activities, for example, ss. 410 & 411 reads as follows:

S.410 (1) The Government of Canada declares that a major objective for Nunavut will be for the ethnical composition, both quantitatively and also in terms of the level of positions held in both the total administrative labour force of the Territorial capital and in the field activities of the new Territorial administration, to reflect proportionately the ethnical composition of the population of Nunavut.

(2) The Government of Canada agrees that every Commissioner appointed for Nunavut Territory for at least the first ten years after the signing of the Final Agreement must be:

- (a) a member of an Inuit community corporation, enrolled as provided in section 302 and 303;
- (b) fluent in both Inuktituk and English, and;
- (c) acceptable to a majority of the Inuit community corporations as determined by a resolution of the Board of Directors of each of those corporations.

S.411 (1) To better enable the Government of Canada to accomplish the objective set forth in S.410, the Inuit Social and Economic Fund will be utilized for special training and education programs for Inuit on the advice of the Government of Nunavut until this objective has been achieved, and the Government of Canada will make interest-free loans to the Inuit Social and Economic Fund so far as necessary until the monies in such Fund are adequate to self-finance such special programs.

(2) The training programs will follow the following guidelines:

- (a) The training program will include on-the-job training of Inuit;

1. The Nunavut Council on Game, composed of eleven members, two of whom would be appointed by the Nunavut Territorial Council and seven by Inuit Community Hunters and Trappers Committees, with power to advise on a number of game related matters and to allocate quotas in relation to game not exclusively reserved to Inuit;
2. Inuit Community Hunters and Trappers Committees to be composed only of Inuit, with power to advise the Council on Game and to administer quotas and licensing of hunting and trapping in their areas;
3. Inuit Community Corporations, to be composed only of persons entitled to participate in the settlement, which would own lands around communities (200,000 of the 250,000 sq. miles to be selected) exempt from any form of taxation, giving them power under the proposal to require "agreements of consent" before development projects could proceed on those lands, such agreements

---

48 (continued)

- (b) Each Inuk working for the Nunavut Territorial Government will be entitled to enroll in such programs which will amount to at least one third of the time that the Inuk has worked or contracted to work for the Territorial Government until he is qualified for a permanent position with the government or has satisfactorily upgraded his position on recommendation of his superiors;
- (c) At any particular time, the minimum number of Inuit to be enrolled in the training program will amount to at least 25 per cent of the total capital labour force and at least 50 per cent of the total field labour force of the Government of Nunavut unless the Territorial Government can give proof to the Minister that no more Inuit are available at the time to be attracted into the labour force of the Territorial Government.

to deal with matters such as the following:

- (a) provisions in respect of social, economic, managerial or financial participation in the development activities by the Inuit community corporation or the Inuit Development Corporation;
  - (b) provisions to ensure satisfactory social and labour conditions for the Inuit participating in the activities;
  - (c) provisions to reduce or avoid undesirable impacts of the activities on the Inuit community or Inuit lands, and appropriate compensation for any possible damage;
  - (d) a provision that the agreement of consent will be terminated before the end of the tenth year;
  - (e) a provision that correspondence with Inuit, instructions for Inuit labour and any other documents related to the operations and of relevance to the Inuit, shall be printed in Inuktitut;
  - (f) subject to section 611, royalties; and
  - (g) an agreement on any other matters which might be of importance to the Inuit.
4. Four Inuit Regional Corporations composed of the community corporations in the region which would own the remaining 50,000 sq. miles and have, in relation to those lands, the same powers as an Inuit community corporation, and which would administer the programs of the Inuit Social and Economic Fund;
5. Inuit Development Corporation, with voting, non-participating and non-transferable shares belonging to the Inuit Community Corporations and non-voting, participating, non-transferable (except after twenty years) shares being distributed to every Inuk,<sup>49</sup> which would receive seventy percent of any royalties paid under the agreement or funds received from the sale or

---

49 Inuk is the singular of Inuit; Inuvialuk is the singular of Inuvialuit.

lease of any Inuit lands, invest and manage those funds without a dividend distribution for at least twenty years, and "assume an important role in participating in scientific research and development projects in relation to Inuit lands";

6. Inuit Tapirisat of Canada, the existing organization with its head office in Toronto which presented the Nunavut proposal and which would, under its terms, be entitled to receive thirty percent of any of the revenue from royalties and land sales or leases<sup>50</sup> and which would: negotiate the final details of the agreement; plan, with the Federal Government, the creation of any new settlement to accommodate Inuit from outside the Nunavut Territory; negotiate land selection on behalf of the community corporations; appoint a member of the Board of Trustees of the Inuit Social and Economic Fund; and, appoint three members to the Board of Governors of the Land Use Planning and Management Commission;
7. Inuit Social and Economic Fund, having a Board of seven trustees, one appointed by each of I.T.C. and the four Inuit Regional Corporations and two by the Federal Government, and charged with establishing priorities for use of the fund by the regional corporations; the money itself being provided by the federal government in an amount equal to two-thirds of the amounts paid

---

50 The agreement does not stipulate what these funds would be used for or on what conditions they would be paid, but the explanatory notes indicate that they would provide "the monies necessary for the support of programs to enhance the Inuit culture", and I.T.C. would distribute part of the money to regional and community associations in Nunavut.

under the agreement as royalties until the trustees indicate that the objectives of the fund have been met. The objectives as set out in the proposal are rather general, but the following extract from the proposal indicates their practical scope:

- S.1004 The following socio-economic programs to be applied on a regional basis, are suggested as examples only, to illustrate the objective and scope of this Part of the settlement.
- a Fur Marketing Agency to deal directly with Hunters and Trappers Committees and to act as a wholesale outlet.
  - a Hunting and Trapping Assistance Program to promote the viability of hunting and trapping as an alternative to wage employment.
  - a program to assist in the construction and maintenance of outpost camps.
  - a financial assistance program to allow local Hunters and Trappers Committees to play a more active role in the hunting and trapping economy.
  - an Inuit Housing Corporation to subsidize the design, construction, renovation and maintenance of Inuit housing.
  - an Inuit Food and Health Plan to subsidize the creation of community-focussed preventative health programs and ensure that proper nutrition and nutrition advice is available to all Inuit.
  - an Inuit Transportation Project for the development of effective Territorial transportation: for example, through subsidizing Inuit travel or perhaps the creation of Inuit-owned air services.
  - an Inuit Education Project to upgrade Inuit education, to assist Inuit in acquiring the necessary skills to manage their own affairs and preserve the vitality of Inuit culture.
  - an Inuit Communications Program to provide subsidies to improve local television, radio and other communication services.

8. Land Use Planning and Management Commission, with a Board of Governors composed of thirteen members; three appointed by

I.T.C., four by the Nunavut legislature who must, in the first five years, be Inuit, three by the Federal Government, and three by national environmental associations. They would be charged with advising the Government of Canada and the public on all aspects of land use and planning and determining the location of Biological Program Areas covering at least thirty percent of the public lands.<sup>51</sup>

Two other features of the Nunavut proposal have implications for future government structures.

Indications have already been given of the number of positions which must be filled by Inuit on the various governing bodies of the agencies which would be created, from the office of Commissioner to the Land Use Planning and Management Commission. In addition, the proposal sets out details of a training program to be financed by the Inuit Social and Economic Fund (with initial interest free loans from the Federal Government as necessary) to meet the objectives of proportional ethnic representation in the public service of the Nunavut Territory and the federal public service within the Territory. Further, the provisions relating to game management contemplate that both levels of government will "increase the number Inuit employed at all levels of game management and wildlife research agencies or departments in Nunavut".

The last major feature is the provision for the interim management and operation of the government of Nunavut:

S.207 To facilitate as quickly as possible the implementation of this Agreement-in-Principle and the Final Agreement,

---

51 Public lands include all of Nunavut except those areas set aside for the Inuit and include the adjacent offshore areas.

the Government of Canada will empower the Minister to act as the Government of Nunavut in every sphere of its jurisdiction as may be necessary to give effect to this Agreement or the Final Agreement, until the Government of Nunavut has been legally constituted and is fully operational in fact as well so as to be able to carry out its jurisdictional responsibilities.

The C.O.P.E. proposal is remarkably similar and, in style and format, shows signs of common authorship with the Nunavut proposal. There are a number of differences between the two, some simply a result of the smaller area concerned, some prompted by different local concerns,<sup>52</sup> some which are refinements on the Nunavut proposal<sup>53</sup> and some which were prompted by the imminent prospect of a MacKenzie Valley pipeline and a continuation of gas and oil exploration activity in the area.<sup>54</sup> For purposes of this discussion the important differences are those relating the structures which would be created.

The principle difference is in the structure of government itself. The C.O.P.E. proposal does not contemplate a separate territory for the region covered by it. It does adopt completely the concept of a Nunavut

---

52 For example, the C.O.P.E. proposal would require the approval of the Council on Game for any timber cutting operations; a matter of little concern in most of the Arctic.

53 For example, more detailed provisions in relation to game regulation, including the introduction of two additional classifications of game.

54 In this last category there are a number of quite interesting proposals, including: land selection to avoid most active exploration areas; ownership of land in fee simple with no restrictions on depth but excepting oil and gas; compensation to the Inuvialuit for any loss in wildlife productivity caused by development activity, with the burden of proving that the loss is due to natural variation on the government; reservation of ten billion cubic feet of natural gas for Inuvialuit at the reference price upon which royalties are based; measures to protect against excessive inflation caused by oil and gas operations and; a declared intention to share the proceeds of royalty payments with Inuit outside the area of the settlement, on a reciprocal basis.



Territory, but does not depend on the acceptance of that concept. Instead, C.O.P.E. proposes an Eastern Arctic Regional Municipality within either the Northwest Territories or Nunavut. This regional municipality would have an elected legislature, with the franchise limited to those who have resided in the area for five years, which would have legislative responsibility initially for game management, education, economic development and police services, and the power to levy real property taxes and business license fees. All legislation would be subject to prior approval by the Minister of Indian Affairs and Northern Development. The proposal recognizes the need for flexibility in this area in order to achieve self-determination in relation to those matters of local concern.

Among other structural differences in the C.O.P.E. proposal are the provisions which would result in the termination of the active role of C.O.P.E. itself, as opposed to the perpetuation of I.T.C. in the Nunavut proposal, and the creation of a natural resources research board to implement long term game planning based upon sound research. The financial structures as well would be significantly altered, with twenty-five percent of royalty revenue going to an Inuvialuit Development Corporation and seventy-five percent to a holding company, the Inuvialuit Investment Corporation, designed to ensure long term preservation of the wealth accruing to the Inuvialuit.<sup>55</sup>

---

55 The share structure of these corporations is significantly different. Under the Nunavut proposal those who are initially entitled to participate would receive participating shares in the Inuit Development Corporation which they would be free to dispose of after 20 years. In the C.O.P.E. proposal, all those eligible would receive participating shares which would never be transferable, and their children, on reaching 18, would also receive shares. Accordingly, family wealth would increase with family size and there would be created a form of status group consisting of the charter group and their lineal descendants in either the male or female line. There would be no blood component in determining status after the initial charter group and, in time, there could conceivably be participating shareholders with only a very small fraction of Inuvialuit blood.

The C.O.P.E. proposal proclaims throughout its realism and, perhaps for that reason, has less emphasis upon the participation of Inuvialuit on governing bodies. The trustee of the Inuvialuit Social Development Program<sup>56</sup> would be appointed by the Federal Government with no requirement that he be an Inuvialuk. Similarly, there is no requirement that the chief executive officer of the regional government be an Inuvialuk or that any of the appointees to bodies such as the natural resources research board, the game council or the land use planning and management commission be Inuvialuit.

Neither the Nunavut proposal, before it was withdrawn, nor the C.O.P.E. proposal have elicited any direct response from the Federal Government. Some general principles establishing the basis upon which the Federal Government is willing to negotiate are set out in the statement of the Federal Government entitled Political Development in the Northwest Territories, released in August, 1977.<sup>57</sup> These principles, together with some more detailed indications of particular matters which the Government is prepared to consider, will be discussed in chapter five, post. The executive of the Government of the Northwest Territories participates in the working groups established to study the various proposals, but has taken no position on the matter independent from that of the Federal Government.

It is possible for the Government of Canada to accept the basic

---

56 This is analogous to the Nunavut proposal's Inuit Social and Economic Fund. The funding under the C.O.P.E. proposal would not be tied to royalty payments, instead being fixed at a minimum of \$20,000,000 or, in the event a pipeline is built, \$40,000,000.

57 The statement is attached as a background paper to the announcement of the appointment of Charles M. Drury as a special representative of the Government on matters of constitutional development in the Northwest Territories, August 3, 1977.

principles underlying these proposals, though some of the details will clearly cause difficulties. The concept of setting aside lands and providing other forms of compensation for the loss of aboriginal rights is consistent with past practice and the more recent model of the James Bay settlement agreement. Part of the preamble to the federal legislation confirming the James Bay settlement indicates the basic principles of that agreement.

... whereas the agreement provides, inter alia, for the grant to or the setting aside for Crees and Inuit of certain lands in the territory, the right of the Crees and Inuit to hunt, fish and trap in accordance with the regime established therein, the establishment in the territory of regional and local governments to ensure the full and active participation of the Crees and Inuit in the administration of the territory, measures to safe-guard and protect their culture and to ensure their involvement in the promotion and developpment of their culture, the establishment of laws, regulations and procedures to manage and protect the environment of the territory, remedial and other measures respecting hydro-electric development in the territory, the creation and continuance of institutions and programs to promote the economic and social development of the Crees and Inuit and to encourage their full participation in society, and income support programs for Cree and Inuit hunters, fishermen and trappers and the payment to the Crees and Inuit of certain monetary compensation; ...<sup>58</sup>

The two Inuit proposals do not reject the traditional forms of Canadian government, though they do reject the present institutions as being effectively dominated by non-Inuit and reflective of non-Inuit values.<sup>59</sup> The proposal for new political groupings to better reflect regional problems and values is not new and not alien to our political traditions though

---

58 Op. cit., fn. 31.

59 Any rejection of "Southern" or "White" institutions would appear somewhat inconsistent with the complex corporate structures proposed which, so far as the writer is aware, would be completely foreign to the Inuit tradition.

boundary changes have, in the past, been based more on economic and historical factors. It is possible within the existing legal framework to create a new territory or regional municipality, to establish the corporate structures and agencies proposed and to alienate the land and royalties requested. The requirement that certain positions within the new governments and agencies be filled by Inuit could run afoul of the Canadian Bill of Rights,<sup>60</sup> but this problem could be overcome by resorting to the exclusion provision of the Bill of Rights<sup>61</sup>, or simply removing the requirements as C.O.P.E. has done.

Neither of the proposals suggest the creation of a political unit based upon race as a matter of constitutional necessity. Both would obviously produce political units where the population was overwhelmingly composed of people of a particular ethnic background different from the majority of the nation as a whole. Again there is nothing in this which is inconsistent with our political traditions; if anything a similar situation in the Province of Quebec is what makes this country unique.

The elements of the proposals which do create problems are those which would place in the hands of the indigenous people the power to dominate political and economic decision making in ways not directly related to their numerical superiority. The requirements for "agreements of consent" before resource development can proceed, the vesting of policy and financial control in relation to a number of matters in the Social and Economic Development Fund, virtual control over game and ownership of all lands around settlements (except for the settlement sites themselves up to one square mile) and other

---

60 R.S.C. 1970, App. III, s.1(b).

61 Ibid., s.2.

aspects of the proposal would strip the territorial and municipal governments of most of the effective decision making power they now have. Further, the power to take initiatives and implement programs, could, depending upon the financial resources available, devolve almost entirely onto non-governmental agencies.

This situation has the potential of creating two quite different kinds of problems. The first is a fundamental problem which would exist as a function of the existence of a regime which would exclude non-Inuit from the decision making processes of local government regardless of any increase in the proportion of non-Inuit in Nunavut or the Western Arctic Region. It would be naive to suppose that the actual power to make decisions effecting the social, cultural and economic life of an area rests exclusively with government or that the decisions of government are always made in accordance with the wishes of the majority. It is not uncommon for the majority to feel that they have little or no control over their own destiny, and even less so it is uncommon for a minority to feel that it has no voice in decision making. The problems and possibilities of political unrest and upheaval created by such situations would be aggravated if a minority white population in the North was effectively excluded from local decision making by the structure of the political institutions. If the absence of the ability to participate is bad, then so much worse is the absence of the right to participate. The problem is further compounded when the right is denied to those people who, because of their education, experience, economic position and relationships with the rest of the country are the very people who would normally be expected to dominate the political institutions. That domination is, of course, a problem which the proposals seek to remedy. Whether the solution which they propose is appropriate or

workable is the dilemma which now faces the north.

The second problem is of a more practical nature, yet closely connected to the first. The principal reason of the Carrothers Commission for recommending against provincial status for the Northwest Territories was the lack of human and economic resources available to such a government. The main reason for recommending against division of the Territories was the danger that such a move would condemn the Eastern Arctic to a colonial status forever. The Inuit proposals, particularly the concept of Nunavut, do not overcome those objections.

Both proposals recognize the need for special programs to prepare Inuit to become actively involved in government and industry, at the same time protecting the opportunity, for those who wish it, to continue or go back to the traditional way of life of the Inuit. The need for such programs if the objectives of the proposals are to be met is forcefully demonstrated by the following comment in the C.O.P.E. proposal:

Although the Inuvialuit constitute the vast majority of the population in the western Arctic region there are no Inuvialuit who are regular police officers, game management officers or nurses, and perhaps a handful who are teachers aids. Something is wrong.

A paradox exists in the Arctic. The government of the N.W.T. continually asserts that it is dominated by a colonially minded federal government, yet it is the sophisticated non-natives who control in fact the Territorial Government and Council who eagerly wish to retain the vast entirety of the N.W.T. as their domain.<sup>62</sup>

In a paper prepared for the Legislative Assembly of the Northwest Territories by Dr. Norman Ward the following observations appear:<sup>63</sup>

---

62 Inuvialuit Nunungat, op. cit. fn 42, p. 20.

63 The memorandum is dated May 17, 1976, tabled document 15-59 of the Legislative Assembly. It is reprinted at (1976) 18 Musk-Ox, 18. It was subjected to a scathing attack by I.T.C. sent to members of the Assembly in August, 1976. Much of the criticism is well founded, but many of the points made by Dr. Ward have a compelling logic to them.

... the area of "Nunavut", 250,000 square miles,<sup>64</sup> happens to be about the area of the province of Saskatchewan. It is not, by itself, an unmanageable size. But Saskatchewan has a population of over 900,000, and at that has its most difficult problems in governing, in ways that would sound familiar to many observers from the Northwest Territories, in its own north. There communications are bad and often non-existent for weeks at a time, and the level of sophisticated understanding of governmental purposes and systems is not high. In northern Saskatchewan, as in the Territories, are many communities where a large proportion of the population is on welfare. "Nunavut" will have a population of 15,000.

The argument here is not a version of the ancient plea that the native peoples are "not ready" for self government. It is that no group of 15,000 persons, from a population of normal age distribution, scattered in several dozen small communities over 250,000 square miles where communications are often poor, could adequately govern themselves for all the complex purposes set forth in "Nunavut". The document itself contemplates a good deal of support, though not direct subsidies, from outside agencies, especially the federal government. It also suggests, although not deliberately, that the support would have to be on such a scale that the formal corporate structure would be meaningless, the haunt perhaps of one more little bureaucracy of the kind that has been criticized in the debates of the Council. Without adequate support the whole well intentioned scheme would almost certainly fail, and the long run results of that for "aboriginal rights" could be incalculable.

The problem of finding the human resources necessary to operate a territorial or regional government is not amenable to easy solution. The Western Arctic Region would have only 2,500 Inuvialuit, most of them children.<sup>65</sup> If C.O.P.E. is correct in saying that a number of people wish to return to the land then all the training programs imaginable will not produce the number of administrators, nurses, teachers, policemen, technicians,

---

64 This shows one of the errors which Dr. Ward did make. The area of Nunavut would be considerably greater than 250,000 square miles, and proportionately more difficult to manage.

65 The Berger Report indicates that at least fifty percent of the population of the N.W.T. today is under fifteen years old. Op. cit., fn.11, p. 147.

and professionals required to operate the complex of agencies and institutions which the C.O.P.E. proposal envisages, at least not in the near future.

The Nunavut proposal does have the interim measure of turning the government back to the hands of the Minister of Indian Affairs and Northern Development. The result may be a restructuring of the institutions so that the Inuit can eventually look forward to a greater measure of self-control, but the immediate effect would be to move from one set of advisors and administrators working under the auspices of a government based in the Northwest Territories, to a set of advisors and administrators again based in Ottawa and under the direct control of the Federal Government.

Such a structure would again be subjected to the same pressures and criticisms which have operated in the past. The local population, including the non-Inuit population which would in effect have administrative control of the government, would push for changes in the structure which would give them a voice in policy. The changes this time would be twofold; to move the centre of power from Ottawa to the north, and from the Inuit dominated institutions to others which would be either more representative or white dominated.

Many of these observations concerning the Inuit proposals can be applied to the Dene<sup>66</sup> and Metis proposals. This does not mean that the

---

66 The words "Indian" and "Dene" are to some extent interchangeable when applied to the N.W.T. The N.W.T. Indian Brotherhood refers to itself as representing the "Dene nation". "Dene" is perhaps more appropriately applied to a racial or linguistic group than the status Indian group represented by the Brotherhood. The Brotherhood has, at its General Assembly in Fort Fitzgerald, Alberta in late June, 1977 indicated that it will accept non-status native people as members in a new category of "declared Dene".



the proposals will not be accepted or implemented at least in part. It does mean that acceptance of some aspects of the proposals may in fact result in an effective regression in terms of self-government for natives and non-natives alike.<sup>67</sup>

## II. The Metis Approach

The Metis Association of the Northwest Territories<sup>68</sup> has presented the most recent formal proposal for the settlement of land claims.<sup>69</sup> For some time they worked on the problem together with the Territorial Indian Brotherhood with a view to making a joint proposal. Because of fundamental differences in ideology and policy, which will become obvious in the discussion of their claims positions, the Metis Association has chosen to go its own way.

The proposal presents eleven basic objectives to be attained by a land claims settlement, without setting out detailed negotiating positions in relation to any of them. The basic thrust of the proposal is that the

---

67 Many other objections to and criticisms of the proposal can be made, particularly in relation to its fiscal aspects. A great deal of work has been done by internal government study groups, but this material is not generally available to the public and the writer has avoided use of or reference to those documents which have come into his hands on a confidential basis.

68 The designation "Metis" does not give a clear idea of the constituency which the Association represents. A number of people in the North see the Metis as quite separate from Indians and whites; the racial and spiritual descendents of the Metis of the prairies. As well as these people, the Association is open to people of mixed native and non-native ancestry who are not registered as Indians under the Indian Act: non-status Indians. Some status Indians for example. James Wah-Shee, a former president of the Indian Brotherhood, have aligned themselves with the Metis Association.

69 Our Land, Our Culture, Our Future, Metis Association of the Northwest Territories (Yellowknife, Sept. 1977).

native people of the area concerned, the Mackenzie Corridor (Figure 3),<sup>70</sup> ought to be recognized as being in possession of their ancestral lands and given compensation for those which have been lost to them<sup>71</sup> while being guaranteed the right to participate in their future development. No details are given in relation to future compensation or participation, other than to indicate that revenue from non-renewable resources would be placed in a "Heritage Fund" to be managed by the Mackenzie Native Council<sup>72</sup> for future generations. Renewable resources of game, fish and timber would be managed by and for the benefit of native people.

The proposal suggests the creation of a new territory in the west, bounded on the east by a line extended north from the Saskatchewan-Manitoba border (Figure 4). The details of the structure of this territory which were included in a discussion paper which formed the basis of the proposal<sup>73</sup> have been left out. The complaint is made that the present Territorial Government is more responsive to the newcomers from the south, whose

---

70 The Metis and Dene solutions are proposed for roughly the same geographic area, though the Metis proposal overlaps in area with the Nunavut Proposal. The Inuit do not want the town of Inuvik; the Dene are silent on it but appear not to want it, and the Metis would exclude it.

71 Compensation for the past would include an immediate cash payment to those over fifty-five years of age, pending the completion of a final agreement, plus a one-time payment in cash to all who would benefit by the agreement, plus a fund to be invested to produce dividends for future generations.

72 The Mackenzie Native Council would be a body comprised of status Indians and Metis, similar to the Council of Yukon Indians. Again, no details of the extent of participation in non-renewable resource development, or of the management and use of the revenue are given. There is a proposal that tax concessions be granted in relation to "certain lands and revenues for aboriginal peoples."

73 Undated. In the writer's collection.

# MACKENZIE CORRIDOR

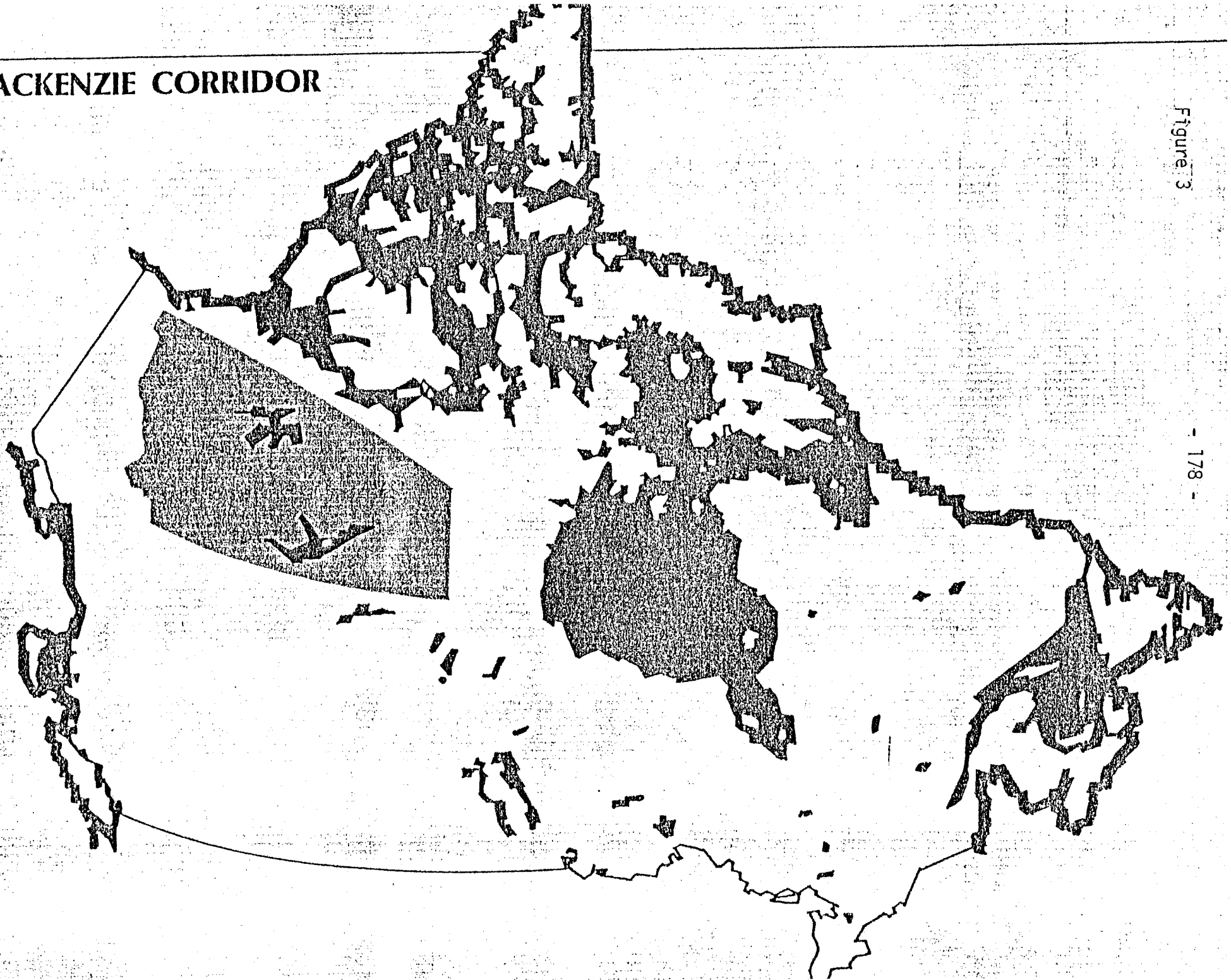
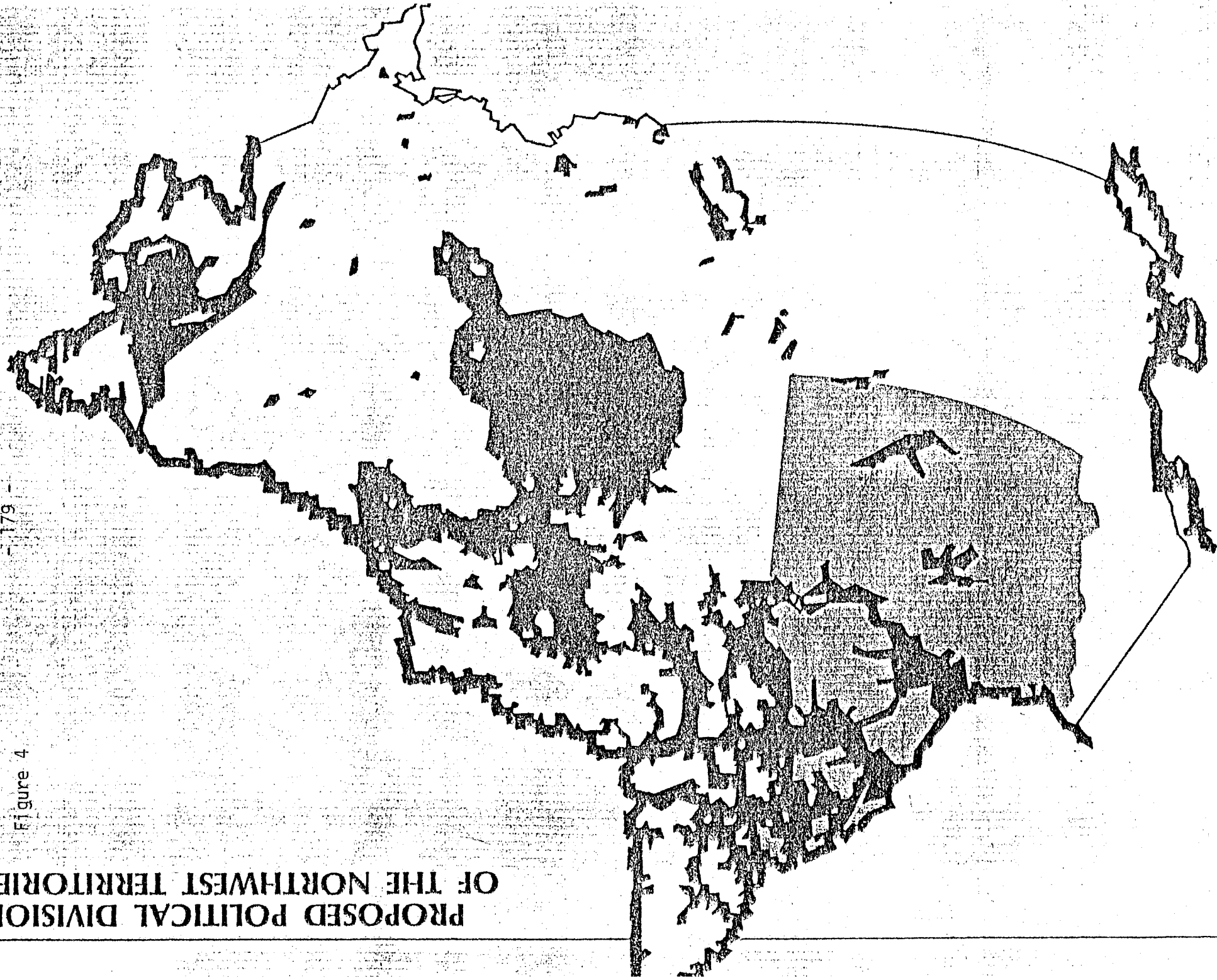


Figure 3

**PROPOSED POLITICAL DIVISION  
OF THE NORTHWEST TERRITORIES**

Figure 4

- 179 -



language it speaks, and that, accordingly, the residency requirement for voting ought to be increased and that more authority be transferred from Ottawa through the Territorial Government to regional and community authorities.

The unique feature of the proposal is the call for the creation of a "Senate of the Mackenzie Corridor". The Senate would be the unified voice of the local community councils in the Mackenzie Corridor, with the power to veto rules or regulations adversely affecting aboriginal lands and to initiate legislation related to renewable resource management and environmental protection. Accountable to the Senate would be a native land use regulatory agency with a veto over developments on aboriginal lands authorized by the Federal or Territorial Governments, subject to a final right of expropriation for compensation by the Federal Government.

The tone of the Metis proposal is markedly different than any of the others presented so far. Like the Dene they do not see themselves as surrendering any land rights other than on a piecemeal basis. Unlike the other proposals they see a continuation of the present structures with a guarantee of their participation in those structures in the areas which most affect them, rather than the exclusion of non-natives. The details of any final agreement will determine to what extent the objectives have been met, but the general statement of principles contained in this proposal contains nothing which is practically or theoretically beyond the limits of what the Federal Government is prepared to negotiate.<sup>74</sup>

---

74 See the discussion of the Federal Government's policy paper, Political Development in the Northwest Territories, (Aug. 3, 1977), post ch. 5. The Metis proposal was not completed until after the release of the policy statement and, when comparing the proposal to the discussion paper which preceded it, it is not unreasonable to suppose that the federal position had some influence in dictating the final form of the Metis position.

Acceptance of the proposal would still produce a political imbalance as the non-native population of the Mackenzie Territory increases. That imbalance would, however, be directly related to a recognition of aboriginal title to land. In other words, the political structures proposed by the Metis to ensure their participation are tied to their ownership of the land and would diminish in importance as the extent of that ownership is diminished by resource development for which they would be compensated. The concept of property owners having a particular voice in relation to political decisions affecting their property is not foreign to our political system and may serve as a useful basis for negotiation.

### III. The Dene Position

So far, the land claim positions discussed have varied in complexity and in detail, but not substantially in their underlying principles. The objectives of all three have been basically those set out in the Inuit proposals; compensation, cultural protection, guarantees of political participation and preservation of the traditional economy. The draft agreement in principle put forward by the Indian Brotherhood of the Northwest Territories in the fall of 1976 is qualitatively different. It deals with the principles which are to govern the future relationship of the Dene and non-Dene in the Mackenzie district, leaving the details for future negotiation.

The first step taken by the Brotherhood in the settlement process was the adoption by a general assembly of the Brotherhood and the Metis Association in Fort Simpson on July 19, 1975, of the Dene Declaration. The Declaration serves as the philosophical underpinning of the Brotherhood's proposed agreement in principle, through no longer of the Metis position, and is both short enough and important enough to warrant repeating in its entirety:

### The Dene Declaration

We the Dene of the N.W.T. insist on the right to be regarded by ourselves and the world as a nation.

Our struggle is for the recognition of the Dene Nation by the Government and people of Canada and the peoples and governments of the world.

As once Europe was the exclusive homeland of the European peoples, Africa the exclusive homeland of the African peoples, the New World, North and South America, was the exclusive homeland of Aboriginal peoples of the New World, the Amerindian and the Inuit.

The New World like other parts of the world has suffered the experience of colonialism and imperialism. Other peoples have occupied the land - often with force - and foreign governments have imposed themselves on our people. Ancient civilizations and ways of life have been destroyed.

Colonialism and imperialism is now dead or dying. Recent years have witnessed the birth of new nations or rebirth of old nations out of the ashes of colonialism.

As Europe is the place where you will find European countries with European governments for European peoples, now also you will find in Africa and Asia the existence of African and Asian countries with African and Asian governments for the African and Asian peoples.

The African and Asian peoples - the peoples of the Third World - have fought for and won the right to self-determination, the right to recognition as distinct peoples and the recognition of themselves as nations.

But in the New World the Native peoples have not fared so well. Even in countries in South America where the Native peoples are the vast majority of the population there is not one country which has Amerindian government for the Amerindian peoples.

Nowhere in the New World have the Native peoples won the right of self-determination and the right to recognition by the world as a distinct people and as Nations.

While the Native people of Canada are a minority in their homeland, the native people of the N.W.T., the Dene and the Inuit, are a majority of the population of the N.W.T.

The Dene find themselves as part of a country. That country is Canada. But the Government of Canada is not the government of the Dene. The Government of the N.W.T. is not the government of the Dene. These governments were not the choice of the Dene, they were imposed upon the Dene.

What we the Dene are struggling for is the recognition of the Dene Nation by the governments and peoples of the world.

And while there are realities we are forced to submit to, such as the existence of a country called Canada, we insist on the right to self-determination as a distinct people and the recognition of the Dene Nation.

We the Dene are part of the Fourth World. And as the peoples and Nations of the world have come to recognize the existence and rights of those peoples who make up the Third World the day must come and will come when the nations of the Fourth World will come to be recognized and respected. The challenge to the Dene and the world is to find the way for the recognition of the Dene Nation.

Our plea to the world is to help us in our struggle to find a place in the world community where we can exercise our right to self-determination as a distinct people and a nation.

What we seek then is independence and self-determination within the country of Canada. This is what we mean when we call for a just land settlement for the Dene Nation.<sup>75</sup>

The proposal itself restates and amplifies the principles upon which the Dene wish to negotiate the details of a final settlement. Again, these principles are worth repeating in their entirety:

1. The Dene have the right to recognition, self-determination, and on-going growth and development as a People and as a Nation.
2. The Dene, as aboriginal people, have a special status under the Constitution of Canada.
3. The Dene, as aboriginal people, have the right to retain ownership of so much of their traditional lands, and under such terms, as to ensure their independence and self-reliance, traditionally, economically and socially, and the maintenance of whatever other rights they have, whether specified in this agreement or not.
4. The definition of the Dene is the right of the Dene. The Dene know who they are.
5. The Dene have the right to practice and preserve their languages, traditions, customs and values.
6. The Dene have the right to develop their own institutions and enjoy their rights as a People in the framework of their own institutions.
7. There will therefore be within Confederation, a Dene



Government with jurisdiction over a geographical area and over subject matters now within the jurisdiction of either the Government of Canada or the Government of the Northwest Territories.

8. The Government of Canada hereafter in the exercise of matters within its jurisdiction (and following a settlement with the Dene) will:

- (a) abandon the "last frontier" mentality and all attempts to colonize and settle Dene lands; and
- (b) do everything in its power to assist in the recognition, survival, and development of the Dene as a People.

9. The Government of Canada will finance the establishment of new Dene communities in cases where existing communities are inhabited by significant numbers of non-Dene and a significant proportion of the Dene community wishes to re-establish themselves elsewhere.

10. The Dene will be compensated by the Government of Canada for past use of Dene land by non-Dene.

11. Within six months of the signing of this agreement negotiations will commence for a final agreement or treaty, and within six months of the signing of the final agreement, legislation incorporating the terms of the final agreement will be submitted to Parliament.

12. It is recognized and accepted that negotiations must allow for the on-going involvement of all Dene.

13. In the interim period between the signing of this agreement and the passing of legislation by Parliament, the parties hereto will not take any actions which violate either the terms or the spirit of this agreement.

14. The Dene agree that non-Dene have the right to self-determination and the use and development of their own institutions; and the Dene pledge their support to the non-Dene in the pursuit of their rights.

15. The Government of Canada will establish a regime to compensate all non-Dene who suffer hardship because of, or non-Dene who wish to leave the Northwest Territories because they are unable to adjust to, changes ensuring the viability of the principles herein contained and particularly measures introduced to guarantee the recognition, self-determination, and development of the Dene as a People.

16. The Dene agree that all non-Dene holding lands in estate fee simple as of October 15, 1976 will not be deprived of their property rights, but after that date all lands will be subject to the terms of this agreement.<sup>76</sup>

---

76 Agreement in Principle between the Dene Nation and Her Majesty the Queen in Right of Canada (N.W.T. Indian Brotherhood, Yellowknife, 1976).

The features which make the Dene position unique are striking in their simplicity. We are not about to enter into a bargain to surrender what you, the colonizers say are our aboriginal rights, and to live in the framework of your government, your institutions, your society. We are the people of the North, the Dene tell us, and if you wish to come and live in our land you come not as colonizers but as immigrants, and you come on our terms, not yours. For those non-Dene already in the North there is an exception:

Because most non-Dene live in a few concentrated urban centres, to assist the federal government in its responsibilities toward these people, we are willing to allow such centres to exist outside the jurisdiction of Dene institutions.<sup>77</sup>

This exception is not discussed in detail but seems to contemplate a number of territorial enclaves for the non-Dene: reservations in reverse.

An exhaustive treatment of the legal, political, philosophical and moral implications of the Dene Declaration and the proposal is far beyond the scope of this thesis. Native land claims in the Mackenzie area have received an enormous amount of attention through the vehicle of the Mackenzie Valley Pipeline Inquiry, and the Brotherhood has used that inquiry to explain and elaborate up on its position. In addition to the parade of approximately one thousand native people who testified at the hearings the Brotherhood called as witnesses a number of their consultants, frequently well-known academics, who stated the legal, political and financial basis of the claim from the Dene point of

---

77 Ibid., introduction, p. 8.

view.<sup>78</sup>

The most articulate and persuasive statement of the principles of the Dene position is contained in the report of Mr. Justice Berger. The Berger report accepts the Dene position in its entirety and supports it with the Judge's findings of fact and predictions for the future in relation to the economic, social, cultural and environmental impact of industrial development in general and a pipeline in particular. Berger repeats the call of the Dene to Canadians to make a fundamental change in their thinking in relation to Native claims; he lends to that call the considerable weight of the personal prestige which he established during the period of his hearings.

Many of the comments which have been made here in relation to the other proposals have been in relation to the practical difficulties of creating and operating the institutions of government without the necessary human resources and of excluding from the political process those people who do have the skills and experience which will lead them to reject such an exclusion. Berger and the Dene recognize very much the first

---

78 The writer does not mean to disparage the integrity of these witnesses or the academic value of their work, but the reader of the material which they presented to Mr. Justice Berger is advised to read critically, bearing in mind that these people have adopted a particular political stance. The following are the summaries of the evidence of some of these consultants, filed as exhibits at the hearing. In each case the summary takes the form of a completed paper on the topic.

Wilf Bean, Colonial Political Institutions in the Communities of the N.W.T. (March, 1976);

Mel Watkins, The Meaning of Underdevelopment (June, 1976);

Douglas E. Sanders, Aboriginal Title: A Legal Perspective (April, 1976);

Peter H. Russell, The Dene Nation and Confederation (April, 1976)

of those problems and the manner in which it is compounded by the demand that political institutions be not only dominated by the Dene, but be characteristically Dene institutions reflecting their traditions and values. It is this, more than anything, which prompted Mr. Justice Berger's recommendation that the construction of a Mackenzie Valley pipeline be postponed for ten years. He draws an analogy to the settlement of Indian claims on the Prairies and the effect upon the settlements of the C.P.R.:

The lesson to be learned from the events of that century is not simply that the failure to recognize native claims may lead to violence but that the claims of the white settlers, and the railway, once acknowledged, soon made it impossible to carry out the promises made to the native peoples.

The Government of Canada was then and is now committed to settling the claims of the native people. White settlement of the West made it impossible for the government to settle native claims. Today, the Government of Canada is pledged to settle native claims in the North, and the pledge is for a comprehensive settlement. It is my conviction that, if the pipeline is built before a settlement of native claims is made and implemented, that pledge will not and, in the nature of things, cannot be fulfilled.<sup>79</sup>

Whether ten years is a sufficient time is questionable. The original basis for a theory of aboriginal rights was the position taken by the colonizing nations that there were no civil institutions, no framework of law, within which to operate, requiring the imposition of European systems on the North American scene. This is not to say that Dene or Inuit do not have political and legal traditions. Any society of men must have. Equally clearly, however, the native traditions have not developed to the stage where they can be applied to the complex problems produced by major resource development, pipeline construction and modern education and communications. In short, they are not designed for modern industrial society.

---

79 Berger Report, op. cit. fn.11, p. 195.

Even though Berger's recommendations for a delay have become of purely academic interest by the selection of an alternate route the problem exists now. The white population, if their members in the Legislative Assembly are at all representative, and at least a significant number of the native people who are represented by the Metis Association and Metis members of the Assembly are not prepared to wait and are not prepared to accede to the demands of the Dene. These people are not only in a position of numerical superiority in the Mackenzie,<sup>80</sup> they have effective control of the governmental and economic institutions in the North now, except for the local governments in native communities. Yet this is as much as Berger was prepared to say about them:

These claims leave unanswered many questions that will have to be clarified and resolved through negotiations between the Government of Canada and the native organizations. A vital question, one of great concern to white northerners, is how Yellowknife, Hay River and other communities with white majorities would fit into this scheme. Would they be part of the new territory? Or would they become enclaves within it? It is not my task to try to resolve these difficult questions. Whether native self-determination requires native hegemony over a geographical area, or whether it can be achieved through the transfer of political control over specific matters to the native people, remain questions to be resolved by negotiations.<sup>81</sup>

The objections raised by white residents of the Territories, for many of whom the North is a homeland even if they do not have their roots

---

80 Mr. Justice Berger was of the opinion that available statistics on the population make-up of the Territories are unreliable. He estimated that the native and non-native populations in the Mackenzie Valley and the Western Arctic are about equal. Berger Report, op. cit., fn.11, p. 147.

81 Ibid., p. 180.

there,<sup>82</sup> receive from Berger what can at best be called a sermon, an exhortation to do the right thing, and a dismissal:

[The native people's] challenges to our assumptions and their assertion of their rights have made many white people in the Northwest Territories uneasy. Native organizations are resented, and the federal government is criticized for providing funds to them. A world in which the native people could not assert their rights is changing into a world in which they can insist and are insisting upon them.

Many white people in the North are convinced that it is wrong to concede that differences based on racial identity, cultural values and economic opportunities even exist. But it is better to articulate and understand these differences than it is to ignore them. The differences are real. They have always existed, but they have been suppressed. Now the native people are proclaiming their right to shape their world in their own image and not in the shadow of ours. As a result, some white people now resent what they regard as an attempt to alter the political, economic and social order of the Northwest Territories. They are right to regard this as an attempt to change the existing order. But they should not resent it, because a growing native consciousness is a fact of life in the North. It was bound to come. It is not going to go away, even if we impose political institutions in which it has no place.<sup>83</sup>

The implications of the acceptance of these principles by the Federal Government on the structure of the political institutions in the North is difficult to predict. Berger recognizes that the range of possibilities is very wide indeed. Peter Russell, in his evidence before Berger, expresses it this way:

---

82 Berger dismisses the majority of the white population as transients who do not regard the North as their home (*ibid.*, p. 147). The writer can speak only of his personal experience of four years in the North and assert that many non-native Northerners, even if they are there temporarily, do identify the North as their home and do consider that they have a voice in what happens there.

83 Ibid., p. 176.

"There is a whole spectrum of possible arrangements which might be proposed within these general parameters. At one extreme are those which would grant the Dene more power and responsibility than the Federal Government politically, or possibly constitutionally, could consider granting and at the other extreme are such limited concessions to the Dene's claims that for the Dene to accept them would be to agree to their own extinction as a people. The purpose of negotiating a land settlement of the type proposed by the Dene would be precisely to explore what alternatives exist between these extremes."<sup>84</sup>

Whether the principles are accepted or not, one consequence of the Dene position can be predicted. There will be a hardening of the divisions which exist now in the Northwest Territories which will inevitably make settlement of native rights issues in the Mackenzie and political development throughout the Territories more difficult. Mr. Justice Berger believes the Dene position to be firm and predicts a "legacy of bitterness" if native aspirations are not met. The land claims proposals have elicited some response from the Territorial government and the Berger report has caused that response to become more forceful and, perhaps, more dogmatic.

To conclude this overview of native claims and their possible impact on political and constitutional development it remains to look at the position of the Executive and Legislature of the Government of the Northwest Territories in relation to them.

#### D. The Territorial Government and Land Claims

The negotiation of a land claims settlement is a matter for the Federal Government. It would, however, be folly in the extreme for that government to fail to seek and consider the opinion of the government which must live with any settlement.

---

84 Op. cit., fn. 78, p. 5.

The executive of the Government of the Northwest Territories, unlike that of the Yukon Government<sup>85</sup>, has not put forward a comprehensive public position on land claims, but the opinion of the Commissioner is clear from two documents which have come to public attention. The first of these was a letter from the Commissioner to the Minister of Indian Affairs and Northern Development, dated October 8, 1971.<sup>86</sup> The letter contains a review of the native claims issue from the Commissioner's perspective and a scathing attack upon the policy of the Federal Government of providing massive funding to native organizations which in turn become involved in matters of primary concern to the Assembly and reject the role of the Assembly in those areas. Commissioner Hodgson saw an increase in confusion in the north caused by apparently conflicting federal government policies and predicted "a head-on collision between [the Assembly] and the Indian Brotherhood".<sup>87</sup> He saw the basis of the problem in these terms:

The basic source of the conflict between native organizations and the Territorial Council is, therefore, over the system by which the legitimate interests of native people can best be expressed. The leadership of the Indian Brotherhood and similar organizations advocate that the interests of the native people are different from those of the majority within the Northwest Territories, and can be met only by their own organizations, yet, at the same time, they assert that they represent the majority -- an inconsistent position, to say the least. The Territorial Council, on the other hand, feels equally strongly that because the native people constitute the majority within the Northwest Territories, their interests

---

85 The Government of the Yukon Territory has produced two public statements of its position; Analysis and Position: Yukon Indian Land Claims (October, 1974); Meaningful Government for all Yukoners: A proposal from the office of the Commissioner (December, 1975).

86 The letter was "leaked" to the press. It may be found as appendix "C" to, Bean Colonial Political Institutions, op. cit. fn. 78.

87 Ibid., p. 10.



can best be served through representation on the Territorial Council, and through settlement and hamlet councils at the local level.<sup>88</sup>

The conflict to which Hodgson referred became more concrete with the Nunavut proposal. The Inuit formally rejected the government in Yellowknife and requested their own, staffed by their own people and dominated by them. The response to this from the Commissioner's office was contained in a brief of the Government of the Northwest Territories to the then Minister of Indian Affairs and Northern Development, Judd Buchanan.<sup>89</sup> The brief acknowledges the desire the Government of the Northwest Territories to become formally involved in the land claims process and the acceptance of the Federal Government's invitation to participate in clarification meetings with I.T.C. and on interdepartmental working committees. In relation to the proposal itself the brief outlines a number of practical difficulties in its implementation and ambiguities in the proposed structures but its principal criticisms are as follows:

- a. The stated goals of the proposal, that is, local self-determination, preservation and local control of hunting and Inuit participation in the political process are all goals to which the N.W.T. Government is committed;
- b. The political aspects of the proposal are of importance to all of the people of the N.W.T. and cannot be negotiated with one ethnic group, ignoring the others, so political aspects of the proposal ought to be dealt with separately from land claims aspects.

The Commissioner's reaction to the concept of a Nunavut Territory was that it would be "completely foreign to any conventional form of government in North America".<sup>90</sup>

---

88 Ibid., p. 10-11.

89 Undated, in the author's collection.

90 Ibid., at p. 14.

... Negotiated political advancement of a particular ethnic group has never been a part of the constitutional process in Canada. This principle would bring a new dimension to the Canadian political scene and it would clearly establish a new development which other ethnic groups could seek to emulate.<sup>91</sup>

The opinions of the Legislative Assembly concerning land claims are of the same basic tenor: land claims ought to be treated as separate from political development; the proper and most effective vehicles for the political development of all residents of the Territories are the institutions which now exist and particularly the Assembly itself.

The Assembly has frequently stated its desire for "an early and equitable settlement by the Government of Canada of legitimate claims of the native residents of the Northwest Territories."<sup>92</sup>

As a body, the Assembly avoided taking any official position with regard to the details or the mechanics of any land claims settlement, seeing this, quite properly, as the preserve of the Federal Government. Because of the positions taken by some of the native organizations, it has, however, repeatedly asserted that with respect to political matters the Assembly alone can speak for all residents of the Territories. The contents of the Nunavut proposal were not compatible with the wish of the majority of the Assembly that land claims and political development be kept separate. The proposal aggravated, moreover, the perception by the Assembly

---

91 Ibid., at p. 11. This assertion is arguable, to say the least. Concessions to ethnic values of language, laws and religion are the basis of the unique position of the Francophone minority in Canada. Events leading to the creation of the Province of Manitoba clearly involved some level of negotiation with the French speaking Roman Catholics of the area.

92 Statement of Evidence of the Legislative Assembly of the N.W.T. to the MacKenzie Valley Pipeline Inquiry (Sept., 1976), at p. 3.

of native organizations as a threat to its existence, as referred to by Hodgson in his brief.

Following publication of the Nunavut proposal, the Assembly was provided with sufficient funds from the territorial budget to retain its own staff to assist in the preparation of a response to the Nunavut proposal and a presentation of its position to the Berger Inquiry and the National Energy Board.<sup>93</sup> Work on the response to the proposal was discontinued when the proposal was withdrawn and the Assembly has not yet commented in detail, as a body, on any of the other proposals. Its views on the general nature of settlements are contained in its paper Priorities for the North, adopted by the Assembly on May 18, 1977<sup>94</sup> and given to the Minister of Indian Affairs and Northern Development for his consideration in preparing the policy statement on political development which was released on August 3, 1977. With regard to land claims the Assembly repeated its assertion that they ought to be treated as an issue separate from, though related to, constitutional and economic development. They call for a speedy resolution of land claims, preferably, but not necessarily, before the commencement of any pipeline construction. They again insist upon representation of the Territorial Government in negotiations, pointing out the future interest of Northerners as residents of a province having control

---

93 Reference to this funding is made in Hodgson's brief on the Nunavut proposal, op. cit., fn. 89. The first result was the paper prepared by Norman Ward, op. cit., fn. 63. It is perhaps not a desirable situation, that the Assembly perceives a need to seek advice outside the public service, but these funds have for the first time allowed the assembly to prepare and publish its own views.

94 Tabled document 17-62.

of its own resources.

The Assembly offers few positive suggestions on the nature of the settlement, but is adamant in its rejection of the concept of a native state:

There can be no institution of government in Canada which denies minorities that freedom of movement within and without the Territories which Canadians enjoy in other parts of the country. Nor can any person living in Canada be denied the right to participate in local political institutions in his country having fulfilled a reasonable residency requirement in his region. This is why the "native state" concept is, and always will be, totally unacceptable to the people of the N.W.T. To speak of "our political right to self-determination, to self-government through institutions of our own choosing" and for recognition "as a people and as a nation" and at the same time to wistfully claim membership in Confederation is, put quite simply, a contradiction in terms. The creation of separate enclaves, which divide people on the basis of race alone and which deny minorities their political rights, is a concept which is contrary not only to Canadian political tradition but repugnant to the Canadian Constitution.<sup>95</sup>

In lieu of a native state they proposed the legislative enshrinement of native rights:

Such a native "Bill of Rights" will crystallize the rights of native people with respect to their use and enjoyment of the land, waters, animal and bird life, and ensure the preservation of their languages and cultures.<sup>96</sup>

No mention is made of precisely what form these "rights" would take, other than references to guarantees of hunting and fishing. The preamble to the paper expands upon the view which the Assembly has of the future of native northerners: full participation in all aspects of government, made possible by education and economic programs which will give native people a realistic choice between their traditional way of life, a modern industrial

---

95 Ibid., p. 3.

96 Ibid., p. 12.

existence or some appropriate mixture of the two.

Priorities for the North clearly defines the major issue to be resolved before serious discussion of the details of a settlement can commence: what, precisely, are the principles upon which the notion of a "settlement" with native people is based? Following the publication of this reply to the Dene Proposal, the Indian Brotherhood published their formal joinder of issue. At an Assembly in Fort St. Gerald, Alberta in June, 1977 they called for the abolition of the Territorial Government as it now exists.<sup>97</sup>

#### E. Conclusion

The account contained in this chapter sets out some of the suggestions which have been made for constitutional change in the Northwest Territories. None of the suggestions have been exhaustively evaluated in terms of either their practicality or the likelihood of their acceptance. All of the suggestions, save that of the Metis Association and, to an extent, that of the Legislative Assembly, were made in contemplation of the imminent approval of the construction of a Mackenzie Valley natural gas pipeline.

The Berger Report, followed by the decision of the National Energy Board,<sup>98</sup> led to the ultimate decision by the Federal Government to select a route which will, for the time being at least, eliminate that drastic social change which the construction of a pipeline would have produced. That decision has also served to shift the focus of public attention away from

---

97 This is contained in a paper presented to the Minister of Indian Affairs and Northern Development, again in contemplation of the government's policy statement.

98 National Energy Board, Reasons for Decisions: Northern Pipelines, 3 volumes (Ottawa, June, 1977).

the Northwest Territories and towards the Yukon, reducing both the practical and political impetus for a settlement of native land claims.

Nevertheless, the issues raised by the various proposals remain, and the choice of direction made by the Federal Government must inevitably lead to a bitter disappointment for some, if not all, of the proponents of these suggestions. A discussion of the choices which the Federal Government has made and the implications which they have for the future of the Territories is contained in the next chapter. As this chapter has focused upon the particular place of native people in the Territories it is well to point out here that, regardless of the official federal position, the movement by northern natives which has culminated in these proposals guarantees that their position cannot be the same as that of their southern counterparts.

The north cannot and will not be simply a reflection of what happened in the west. The native people of the Territories do not yet compete with their non-native neighbours on anything resembling an equal basis, but they have obtained a level of political awareness and skill which promises to see them take a greater role in the institutions of government at every level. The breathing space allowed by the postponement of any massive economic developments will provide the time and the environment which Mr. Justice Berger and the Indian Brotherhood saw as necessary for a reasoned settlement of land claims and the effective implementation of that settlement. Whether greater participation in the political process is guaranteed by such a settlement or not, the participation will have come about by the very process of settlement itself. That participation will, in turn, be bound to have an effect upon the way in which the institutions of government operate and the values which they promote.

At the same time, it appears clear that native land claims settlements themselves, no matter what form they take within the range of options which has been put forward, will of necessity alter the political and governmental structures which now exist. The native people of the north have now a "special status" under the law and in relation to the land. That status is not given any substantial measure of recognition now in the constitution of the Northwest Territories. A settlement of land claims must, by its very nature, constitute a recognition of that status. The terms of the settlement, unless they are limited strictly to compensation, a proposal which no responsible agency espouses, will result in some level of entrenchment of that status in the constitution of the Northwest Territories.

## Chapter Five

### DIRECTIONS FOR THE FUTURE

The preceding chapters have outlined the present state of the constitution of the Northwest Territories and, in the areas of resource control and native claims, have shown the nature of some of the pressures for change in the constitution, both internally and in respect of the relationship between the Territorial and Federal Governments. This chapter will examine further some recent developments and attempt to reach some conclusions about the future direction of constitutional development in the Northwest Territories.

#### A. The Position of the Legislative Assembly

Some reference has already been made to the position taken by the Legislative Assembly in relation to the land claims. The overall position of the Assembly is to be found in its paper, Priorities for the North,<sup>1</sup> presented to the Minister of Indian Affairs and Northern Development in July, 1977. The paper deals with constitutional development, land claims<sup>2</sup> and economic development.

---

1. The paper was written as a result of a confrontation between the Assembly on the one hand and the Minister and the Commissioner on the other in February, 1977. At that time the Assembly proposed an inquiry, to be conducted under its auspices, into constitutional development in the N.W.T. To this end an Inquiries Ordinance was introduced as a private member's Bill and passed and the Assembly sought the Commissioner's recommendation, required because it was a money bill, of an ordinance establishing the particular inquiry. The Commissioner refused and the Assembly in consequence adjourned without passing the Appropriation Ordinance for the 1977-78 fiscal year. At a meeting of March 11, 1977 the Minister invited the Assembly to participate in the development of a policy statement on the North. One of the consequences of that invitation was Priorities for the North. See generally, Debates, N.W.T. Legislative Assembly, 61st Sess., March 28, 1977.



The basic thrust of the Assembly's proposals on constitutional development is that the Territories should continue to evolve towards full membership in Confederation as a province with the same constitutional structure and values as the provinces and the same powers as the provinces.

Specifically, the Assembly asks for an immediate transfer of all provincial type responsibilities to the Government of the Northwest Territories save resource management and amendment of its own constitution. They ask for a commitment and a definite timetable for the transfer of renewable and non-renewable resource management and the development of full responsible government. As interim measures on the road to responsible government they propose: (a) that membership in the Executive Council be increased and that it have the power to implement its majority decisions, subject to specific instructions to the contrary from the Minister or the Governor in Council; (b) that the office of Assistant Commissioner be abolished and the Deputy Commissioner be chosen from the ranks of the Assembly and evolve towards the position of a Premier; (c) that the Commissioner become more akin to a Lieutenant-Governor; (d) that the Commissioner and his Deputy be paid from Territorial funds, and; (e) that the name of the legislature be formally changed to the Legislative Assembly of the Northwest Territories.

The notion of "native states" is specifically rejected by the Assembly. The paper endorses an increase in the devolution of power to local communities, but insists upon the continuation of a universal adult franchise subject to reasonable residence requirements.

No specific suggestions are made with regard to division of the Territories, but the idea is not rejected out of hand. The Assembly proposes that the question of division be examined by the minister's special representative on constitutional development<sup>3</sup> and perhaps, be made the subject of a referendum.

The Assembly's position with regard to native land claims has been discussed. In summary, the Assembly rejects a "constitutional" settlement of native claims in favour of a settlement directed towards compensation coupled with the entrenchment, within the existing constitutional framework, of a "Native Bill of Rights" which would guarantee rights to use the land, waters and wildlife and protect linguistic and cultural values. They reject any moratorium on economic development pending settlement of native claims and claim the right, as representatives of all residents of the Territories, to participate with the Federal Government in the negotiation of native claims settlements.

In respect of economic development the Assembly makes no specific proposals apart, again, from suggestions to alter the decision making structure. They see the need for a balanced economy created by the encouragement of private enterprise in both large scale non-renewable resource developments and the development of small businesses, agriculture, and renewable resource based activities. They do not reject federal assistance in the economic field, but insist that encouragement and control of economic development are best made the subject of local decision making in order to reflect the values and objectives

---

3. The terms of reference of this special representative, the Hon. C.M. Drury, are discussed later in this chapter.

of northern residents. Specifically, in order to manage non-renewable resource development and to provide a revenue base for government it is necessary that the Territorial Government have the authority to manage all surface and sub-surface land resources.

B. The Federal Position

The release of the Federal Government's position on these matters was delayed until August 3, 1977 when it simultaneously announced the appointment of the Hon. Charles M. Drury as the Prime Minister's special representative for constitutional development in the Northwest Territories and released a background paper entitled Political Development in the Northwest Territories.<sup>4</sup>

The appointment of Mr. Drury was in response to the Assembly's request for an inquiry to continue the work of the Carrother's Commission and, in part, is the implementation by the Federal Government of its decision not to negotiate major constitutional changes within the context of land claims settlements. The terms of reference of the appointment and the accompanying background paper give some indication of how the Federal Government intends to proceed in respect of the constitutional development of the Territories, and what direction they intend to take.

Mr. Drury's mandate is:

To conduct a systematic consultation with recognized leaders of the Territorial Government, northern communities and native groups about specific measures for modifying and improving the existing structures,

---

4. Dated July 19, 1977.

institutions and systems of government in the Northwest Territories, with a view to extending representative, responsive and effective government to all parts of the Territories and at the same time accommodating the legitimate interests of all groups in northern society, beginning with those of the Indian, Inuit and Metis;<sup>5</sup>

He is appointed to seek a consensus among the various groups concerning the legislative and administrative steps to be taken; to coordinate those steps with native land claims activities; to keep the Territorial Government and other interested parties informed of his progress; to consult with the ad hoc Cabinet Committee on Constitutional Development in the North and, finally; to report to the Prime Minister with recommendations for action by the Federal Government.

The terms of reference also include a listing of specific questions which he is authorized to include in his agenda. This list is very broad and runs the gamut from possible division of the Territories, to transfer of further responsibilities to the Territorial Government and local communities, to promoting native participation in government and guaranteeing native life-styles and cultures, to continued federal ownership and control of land based resources. The only explicit restriction in his terms of reference is that he shall not consider the possible division of the Territories or political structures "based solely on distinctions of race."

The terms of reference make two Federal positions perfectly clear: the Federal Government will not discuss the creation of "native states" or exclusively native political institutions, and

---

5. Special Government Representative for Constitutional Development in the Northwest Territories: Terms of Reference (Ottawa, July 19, 1977).

constitutional charges will be made after a process of consultation, not adjudication or negotiation. It is noteworthy that Mr. Drury is not to conduct a "Berger-type" inquiry. He is not instructed to hold public meetings or public hearings. He is to speak to the leaders in the Territorial Government, unspecified local and native leaders and "other participants he may wish to invite." Given his terms of reference and Mr. Drury's background as a member of Cabinet in the present government it is likely safe to say that the Federal Government is not prepared to take the risk of losing control of the consultation process and will not lose control of it.

The background paper provides further insight into the approach of the Federal Government and the matters which it is prepared to consider. The paper attributes the current pressures for constitutional change to a general demand for greater self-determination at the Territorial and local level, the determination of native people to obtain recognition and power and the need for control over economic development. These factors have aggravated each other and produced a climate of tension and hostility between the Legislative Assembly and native organizations.

Given that background the paper first reiterates five basic propositions to which the Federal Government is committed:

1. the further evolution of self government;
2. fulfilling the needs of all northerners;
3. negotiation of comprehensive native land claims;
4. increasing involvement of local communities and other groups in decisions related to major resource developments;
5. the promotion and safeguarding of the identity of native people in Canadian society, and an improved relationship with them by a cooperative approach to policy and program development.<sup>6</sup>

---

6. Op. cit., fn. 4, pp. 3-4.

In light of these propositions, and without retracting any of them, the Federal Government acknowledges "that the time has come to take further major steps in the direction of enabling all northerners to govern themselves in ways of thier own choosing."<sup>7</sup> Those steps will be determined by consultations conducted by Mr. Drury within the policy framework provided by the balance of the paper.

The statement is then divided into six areas. The last two describe the process of consultation, with a warning that it will be time consuming and gradual, and distinguish the situation in the Yukon. The first four, on non-renewable resource development, protection of native rights and interests, division and devolution in the Territories and responsible government contain the substance of the policy.

#### 1. Non-renewable resource development

The Federal Government again affirms its basic policy towards northern non-renewable resources:

National interest dictates that the Federal Government maintain its ownership and control of the potentially significant non-renewable resources in the Northwest Territories.<sup>8</sup>

The abruptness of that statement is modified by an indication of willingness to negotiate some sharing in the revenue from non-renewable resources with native groups and the Territorial Government. They are prepared to consult with native groups and the Territorial Government on exploration and development activities and environmental

---

7. Ibid, p. 4.

8. Ibid, p. 5.

protection, but they are not, for the time being, prepared to surrender the right to decide these issues.

The transfer of surface rights and management of renewable resources to the Territorial Government will continue and be augmented by the terms of native claims settlements which will result in some ownership and management rights being given to native groups. This will necessitate the development of a planning and co-ordination system to ensure orderly economic development. Again, the Federal Government, by virtue of its control of non-renewable resources, will have a substantial if not deciding voice.

## 2. Protection of Native Rights and Interests

This portion of the paper is perhaps the most cautious. The Federal Government recognizes that the rights of native minorities in the Territories as they are confirmed by land claims settlements or as they are recognized in the constitutional consultation process will require some measure of protection from future Territorial Governments in a white dominated Northwest Territories.

The only possibility for protecting these interests which is rejected is the suggestion of long (ten to fifteen years) residence requirements for voting. A number of other possibilities which the paper suggests might be considered, in addition to some lengthening of residence requirements, include:

- a) an advisory commission or council on native affairs with a veto over Territorial actions conflicting with specified native rights;
- b) a guarantee of proportionate representation for natives on all major Territorial Government boards, committees, and commissions responsible for land use, conservation and environmental protection, inland waters, game management, education and cultural pursuits;

- c) reserved power in certain areas to be confined to the Commissioner or Minister of Indian Affairs;
- d) a ward system in the larger mixed communities to ensure native participation in civic politics;
- e) electoral boundaries which would reflect the community of interests in various regions, for example, greater proportional representation from rural areas.

Though this section of the paper is short and does not purport to set out much in the way of definite Federal Government policy, its significance lies in the very nature of its subject matter. It would seem from these suggestions that the Federal Government, while prepared to concede some native voice with regard to resource development, does not envisage the negotiation or creation of native political institutions. Natives will be encouraged and assisted to participate in the normal political institutions at the civic and Territorial level, but they will not have "native" Territorial institutions. The Federal Government seems to be adopting, in large measure, the approach of the Legislative Assembly of protecting native political and cultural interests by a form of entrenched native bill of rights.

### 3. Division and Devolution in the Northwest Territories

It is in this area that the paper most clearly articulates the Government's position. The devolution of power to local communities is to be encouraged, and it may be necessary to further decentralize decision making in the Territories by a division into two or more Territories each having a direct relationship to the Federal Government. This may have the practical effect of giving native people effective control over local Territorial decision making. Further, it may be advisable to create forms of regional government within the existing Northwest Territories in order to better reflect



regional interests and values in matters such as education, land use, game management and renewable resource development. The regional governments could and probably would have the same practical effect of producing native control over decision making in these areas.

But that is where the process stops. To quote the paper:

In the North, as in the South, the Government supports cultural diversity as a necessary characteristic of Canada. However, political structure is something quite different. Legislative authority and governmental jurisdiction are not allocated in Canada on grounds that differentiate between people on the basis of race. Authority is assigned to legislatures that are representative of all the people within any area on a basis of complete equality. Jurisdiction is placed in the hands of governments that are responsible, directly or indirectly, to the people - again, without regard to race. These are principles that the Government considers it essential to maintain for any political regime or governmental structure in the Northwest Territories.

Accordingly, unless the Indians and Inuit claimants are seeking the establishment of reserves under the Indian Act, as in the South, the Government does not favour the creation in the North of new political divisions, with boundaries and governmental structures based essentially on distinctions of race and involving a direct relationship with the Federal Government.<sup>9</sup>

#### 4. Responsible Government

Having stated one form of constitutional change which it is not prepared to implement, the Government, in this section, sets out some of the changes it is prepared to consider.

This does not include provincial status for either Territory

---

9. Ibid, p. 11-12.

at the present time, in part because of the desire of native people to first see their own political base consolidated and the relationships of native and non-native established by the claims process before provincial status is granted. The Government is prepared to take further steps toward the "phased extension of responsible government"<sup>10</sup> including the following possibilities:

- a) restructuring political institutions and powers, including the composition and jurisdiction of the Assembly, the composition and vote of the Executive Committee, the role of the Commissioner and reserved powers of the Minister or Governor-in-Council;
- b) the transfer and delegation of Federal responsibilities and programs to the Territorial Government;
- c) the devolution of responsibility from the Territorial Government to local communities or regional institutions.

The speed and nature of the changes will vary from region to region and be affected by any division of the Territories. In large measure the increase in responsibility will be related to changes in fiscal responsibility and the ability of the Territorial and local governments to operate without financial dependence on the Federal Government.

### C. Conclusions

The conclusions of earlier chapters are for the most part reflected in the policy paper of the Federal Government and in the nature of the process which it has implemented to determine the future course of the development of Territorial Government.

---

10. Ibid, p. 15.

It may have appeared, for a short time, that the sense of urgency created by the prospect of a Mackenzie Valley pipeline coupled with the insistent and well organized demands of native groups was likely to produce a disruption of the slow, yet steady, repetition of the earlier pattern set in the West in relation to constitutional development. The threat by the Assembly to withhold the supply bill was a clear manifestation of that urgency. It was also a clear manifestation by the Assembly of its perception of its status as a legislature, capable of exercising its powers to their limit in the face of resistance by the Executive and the Federal Government.

That situation has now been substantially defused. The decision to build the pipeline through the Yukon has taken much of the urgency from the issues of native claims and local control over major developments, though both issues clearly remain to be resolved. The Assembly has been mollified by the creation of a process in which it will have a clear opportunity to express its views without having to compete directly with native groups. More important, the Assembly has seen the acceptance of its basic position, that constitutional structures should not be the subject of native claims negotiations.

The negotiation process cannot be expected to produce quick or easy results. The refusal of the Inuit Tapirisat of Canada and the Indian Brotherhood of the Northwest Territories to meet with Mr. Drury<sup>11</sup> demonstrates the extent of the divisions which exist.

---

11. Toronto Globe and Mail, Dec. 14, 1977, p. 10.

The refusal, particularly by the Brotherhood, is not surprising. The policy paper and Drury's terms of reference are based upon a premise which the Brotherhood cannot, in light of its present position, accept. The Federal Government has made it clear that Canada as a whole will approach the North on its own terms, not on the terms set down by the indigenous inhabitants.

Nevertheless, there is ample room for negotiation and compromise between the native groups, the Territorial Government and the Federal Government. The position of the Metis, for example, sets out a number of items to be negotiated, none of which fall outside the range of possible alternatives discussed in the Federal Government's policy paper. Similarly, major aspects of the C.O.P.E. and I.T.C. proposals are amenable to negotiation within the confines of the Federal Government's position.

It may fairly be said that the Territorial Government is now a government in the true sense of the word, exercising powers and functions similar to those of a provincial government, yet still very much under the wing of the Federal Government, and still very much in a state of evolution.

That evolution will continue to be slow and orderly and tend generally towards the creation of one or more new provinces (not necessarily for the whole of the Territories at the same time) with responsible government. The pattern will be similar to developments in the West prior to 1905, but by no means identical. The similarity will lie in the speed and extent to which federal responsibilities are transferred and to which the executive branch of the Territorial government becomes more responsible.

Programs which affect people, but not resources, will soon be transferred to the Territorial Government, for example, labour relations and health. Sources of revenue, particularly those which are not resource related, will also be transferred quite quickly.<sup>12</sup>

The evolution towards provincial status will be impeded by the perception of the Federal Government of the need to retain a sufficient measure of control over natural resources in order to insure its ability to implement its own policies in relation to energy and the distribution of potential non-renewable resources revenues. Accordingly, the Territorial Government should soon have local control over renewable resources which have no significant national impact, so long as that control cannot interfere with federal policy. In the same way the Territorial Government will likely receive a share of non-renewable resource revenue, but not so large a share that the amount produced by it is likely to exceed what the Federal Government would pay to support Territorial programs anyway. The policy that the wealth of the North belongs to all Canadians will not change beyond saying that the surplus wealth of the North belongs to all Canadians.

The extent of progress towards responsible government and the speed with which that progress is made is more difficult to predict. The Federal Government will be reluctant to surrender its right to have a direct voice in Territorial legislative and

---

12. On Dec. 2, 1977 the Minister of Indian Affairs and Northern Development announced that the N.W.T. will impose its own personal income tax effective January 1, 1978.

administrative policy until forced to. This is perhaps not so much the result of any definite policy position as it is the result of simple bureaucratic inertia. In any event the Commissioner will not become a Lieutenant-Governor accountable to the Assembly until native claims have been settled and certain native rights guaranteed in such a manner that they cannot readily be affected by the Assembly. The Federal Government will not leave the Territorial Government to manage its own affairs without a substantial degree of supervision until the Territories achieve a much greater degree of financial independence than they now have.

It may be that another crisis such as that which precipitated the appointment of Mr. Drury will be necessary to produce responsible government. It is perhaps not essential, but major steps in constitutional development have frequently resulted from major confrontations. We may again see a refusal to pass supply or, as happened in the pre-1905 Territories, mass resignation of the elected members of the executive.<sup>13</sup>

The principal difference between the new Territories and the old will be the manner in which the political institutions accommodate the interests of the native inhabitants of the North. Until recently there was no perceptible difference in the degree of participation of native people in government as native people from the system which prevailed in the prairies in the last century. Native people

---

13. In October, 1977, David Nickerson, the member from Yellowknife North and Minister of Social and Economic Development resigned his portfolio in protest against the Commissioner's position that the Executive Committee was merely an advisory body whose recommendations the Commissioner was free to reject.

have had the vote since 1951 when the first of the Council's members were elected, and all areas of the Territories have been represented since 1966, but the only recognition of any special interests of native people were provisions in the Northwest Territories Act protecting, to some extent, their right to hunt, fish and trap. No accommodation of native people was made in the structure of political institutions and their participation in those institutions at the Territorial level has been minimal.

That situation will change, and the change will likely be substantial. The Federal Government has indicated its willingness to take steps, either through direct constitutional change or as a part of land claims settlements, to protect certain values of lifestyle and culture and to guarantee a minimum degree of native participation in the political process. The extent to which native people enter the government will depend upon the speed of economic development and the growth of the non-native population, and the willingness of native leaders to participate.

Two other factors are, perhaps, more important than any proposed guarantees. The first derives from the nature of northern settlement and economic development coupled with the changed perception of native rights. The kinds of developments likely to take place in the North are not likely to require or produce massive increases in population. Native people will, by and large, be able to remain where they are and move about freely. As much as some kinds of economic and industrial activity may disrupt traditional lifestyles and pursuits, they will not necessitate the removal of native people to reserves or a wholesale permanent occupation of land.

Neither the Federal Government nor the native organizations propose any type of reserve system entailing separation of native people from the mainstream of activity, under the guise of a protective wardship. On the contrary, the emphasis is upon increased local government without Federal Government interference.

The second factor is the existence of strong native political organizations. These organizations have come into existence largely in order to facilitate the settlement of land claims, and it is likely that the claims settlements will perpetuate the organizations, or others like them, by requiring structures to administer the implementation of the settlements, the responsibilities given to natives for game management and resource consultation and the lands and funds provided as compensation. Some of these organizations, such as C.O.P.E. and the Indian Brotherhood, have shown through the Mackenzie Valley Pipeline Inquiry just how politically effective they can be. Whether they form part of the structure of government or a pressure group outside of government, they are and will remain a power to be reckoned with in the North.

The future holds the promise that the Northwest Territories will eventually take its place within confederation as a member, not a possession; a member which has evolved politically in a manner consistent with our finest constitutional traditions, yet having avoided much of the less honourable history of our relations with the country's indigenous inhabitants.



## LIST OF REFERENCES

### Government of Canada

- Advisory Commission on the Development of Government in the Northwest Territories (Carrothers, Beetz, Parker), Ottawa, 1966
- Debates, House of Commons, 1891, 1953, 1965
- House of Commons, Bill C-83, first sess., 26th Parl.
- House of Commons, Bill C-84, first sess., 26th Parl.
- House of Commons, Sessional Papers, 1885, No. 61.
- Indian Claims in Canada (Research Resource Centre, Indian Claims Commission), Ottawa, 1975
- Inuit Land Use and Occupancy Project, Report (Dept. of Indian Affairs and Northern Development), 3 vols., Ottawa, 1976.
- Mackenzie Valley Pipeline Inquiry, Report, 2 vols., Ottawa, 1977.
- National Energy Board, Reasons for Decisions: Northern Pipelines, 3 vols., Ottawa, 1977.
- Royal Commission on Dominion-Provincial Relations (Rowell-Sirois), Report, 3 vols., Ottawa, 1940.
- Royal Commission on the Natural Resources of Alberta (Dysart, A.K., Chairman), Ottawa, 1935.
- Royal Commission on the Natural Resources of Manitoba (Turgeon, W.F.A., Chairman), Ottawa, 1929.
- Royal Commission on the Natural Resources of Saskatchewan (Dysart, A.K., Chairman), Ottawa, 1935.

### Government of the Northwest Territories

- Annual Report, Yellowknife, 1976.
- Brief to the Minister of Indian Affairs and Northern Development on the Nunavut Proposal, Yellowknife, undated.
- Legislative Assembly - Debates, 1976, 1977.
- Legislative Assembly - Statement of Evidence to the Mackenzie Valley Pipeline Inquiry, Yellowknife, 1976.
- Legislative Assembly- Priorities for the North (Tabled Document 17-62), Yellowknife, 1977.
- The Northwest Territories Today, Ottawa, 1965.

### Government of the Yukon Territory

- Analysis and Position: Yukon Indian Land Claims, Whitehorse, Oct., 1974.
- Meaningful Government for all Yukoners: A Proposal from the Office of the Commissioner, Whitehorse, Dec., 1975.

### Government of the United Kingdom

- House of Commons, Debates, 1811, 1857.

Bean, Wilf, Colonial Political Institutions in the Communities of the Northwest Territories (Statement of Evidence to the Mackenzie Valley Pipeline Inquiry), March, 1976.

Bloom, J.P. (ed.), The American Territorial System, Ohio University Press, 1973.

Chretien, Jean, Statement on Development of Government in the Northwest Territories, Yellowknife, Nov. 10, 1969.

- Memorandum on the Legislative Powers of the Northwest Territories Council, Ottawa, 1972.

Committee of Original Peoples' Entitlement, Inuvialuit Nunangat, Inuvik, 1977.

Fumoleau, Rene, As Long as This Land Shall Last, Toronto, 1976.

Grey, James H., Booze, Macmillan of Canada, Toronto, 1972.

- Red Lights on the Prairies, Macmillan of Canada, Toronto, 1971.

Hamelin, Louis-Edmond, Speech delivered at the University of Saskatchewan, March, 1974.

Hodgson, S.M., Speech to the Northwest Territories Association of Municipalities, Oct., 1973.

Hogg, P.W., "The Canadian Bill of Rights - 'Equality Before the Law'" (1973) 6 Ottawa Law Rev. 263.

Indian Brotherhood of the Northwest Territories, The Dene Declaration, Fort Simpson, 1975 (reprinted in (1976), 17 C.A.S.N.P. Bulletin 3).

- Agreement in Principle Between the Dene Nation and Her Majesty the Queen in Right of Canada, Yellowknife, 1976.

Inuit Tapirisat of Canada, The Nunavut Proposal, Ottawa, 1976 (reprinted in (1976), 18 Musk-Ox 3.)

Katz, "The Indian Act and Equality Before the Law" (1973), 6 Ottawa Law Rev. 277.

LaForest, G.V., Natural Resources and Public Property Under the Canadian Constitution, U. of T. Press, 1969.

Lingaard, C.C., Territorial Government in Canada, U. of T. Press, 1946.

Martin, Chester, The Natural Resources Question, King's Printer, Winnipeg, 1920.

McCaul, C.C., "The Constitutional Status of the North-West Territories of Canada" (1884), 4 Can. Law Times 1, 49.

M'Gonigle, R.M., "The Bill of Rights and the Indian Act: Either? Or?" (1977), 15 Alta. Law Rev. 292.

McNarron, C.A., "Transportation, Communication and the Constitution; The Scope of Federal Jurisdictions" (1969), 47 Can. Bar Rev. 355.

Metis Association of the Northwest Territories, Discussion Paper on Land Claims, Yellowknife, undated.

- Our Land, Our Culture, Our Future, Yellowknife, Sept., 1977.

- Morris, Alexander, The Treaties of Canada with the Indians, Toronto, 1880.
- Oliver, E.H. (ed.), The Canadian North-West - Early Development and Legislative Records, Canadian Archives, Ottawa, 1915.
- Pope, Joseph, Confederation Documents, Toronto, 1895.
- Rae, K.J., The Political Economy of the Canadian North, U. of T. Press, 1968.  
- The Political Economy of Northern Development, Information Canada, Ottawa, 1976.
- Russell, Peter H., The Dene Nation and Confederation (Statement of Evidence to the Mackenzie Valley Pipeline Inquiry), Yellowknife, April, 1976.
- Sanders, Douglas E., Aboriginal Title: A Legal Perspective (Statement of Evidence to the Mackenzie Valley Pipeline Inquiry), Yellowknife, April, 1976.
- Scott, F.R., "Canadian Federalism; The Legal Perspective" (1966), 5 Alta. Law Rev. 263.
- Searle, D.H., "Government in the Northwest Territories" (1966), 5 Alta. Law Rev. 299.
- Tarnopolsky, W., "The Canadian Bill of Rights from Diefenbaker to Drybones" (1971), 17 McGill L.J. 422.
- Thomas, L.H., The Struggle for Responsible Government in the Northwest Territories 1870-1897, U. of T. Press, 1956.
- Thompson, A.R., "Ownership of Natural Resources in the Northwest Territories" (1967), 5 Alta. Law Rev. 304.
- Underhill, Frank (ed.), The Canadian Northwest: Its Potentialities, U. of T. Press, 1959.
- United Nations General Assembly, Resolution No. 1803 (XVII), Dec. 14, 1962.
- United States of America, Statutes, Alaska Native Claims Settlement Act, (1971) P.L. 92-203, amended by, (1976) P.L. 94-204.
- Ward, Norman, Memorandum on the Nunavut Proposal (1976), 18 Musk-Ox 18.
- Watkins, Mel, The Meaning of Underdevelopment (Statement of Evidence to the Mackenzie Valley Pipeline Inquiry), Yellowknife, June, 1976.
- Zaslow, Morris, A Prelude to Self-Government: The N.W.T., 1905-1939, in Underhill, supra, 1959.